In the Supreme Court of the United States

REGINALD A. COOKE,

Petitioner,

v.

UNITED DAIRY FARMERS, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

JAMES R. LEICKLY
Counsel of Record
326 S. HIGH STREET
SUITE 300
COLUMBUS, OH 43215
(614) 222-0509

JOHN A. YAKLEVICH
MOORE & YAKLEVICH
326 S. HIGH STREET
SUITE 300
COLUMBUS, OH 43215
(614) 241-5902

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED FOR REVIEW

Is an attorney at law, who represents a client in conformity with all applicable rules of professional conduct governing pretrial publicity, thereby subject to designation as a limited purpose public figure pursuant to this Court's holding in *Gertz v. Welch*, 418 U.S. 323 (1974), so as to be required to submit evidence in a subsequent defamation action that the defendants published their defamatory statements with actual malice?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is an individual who was the plaintiff in the state court defamation action which gave rise to this appeal.

Respondents

Respondent United Dairy Farmers, Inc. is an Ohio for-profit corporation which to Petitioner's knowledge and belief has no parent corporation and is not ten percent owned by any publicly traded company. Respondent Brian Gillan is an individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for the issuance of a Writ of Certiorari to review the judgment rendered in this case by the Ohio Tenth District Court of Appeals on March 31, 2005.

OPINIONS BELOW

The opinion advanced for review is the March 31, 2005 opinion of the Franklin County Court of Appeals, Ohio Tenth Appellant District, in Appeal No. 04APE-08-817, a copy of which is included in Appendix B at 2a-27a. The July 30, 2004 decision and entry of the Franklin County, Ohio Court of Common Pleas from which Respondent prosecuted Appeal No. 04APE-08-817 is included in Appendix C at 28a-54a, and an opinion of the Franklin County, Ohio Court of Appeals in an earlier appeal of this case, Appeal No. 02APE-07-781, is included in Appendix D at 55a-74a. Appellant timely sought review of Appeal No. 04APE-08-817 by the Supreme Court of Ohio.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered its final judgment dismissing Respondent's Memorandum in support of Jurisdiction on September 7, 2005. (Appendix A at 1a). Petitioner respectfully invokes this Court's jurisdiction under and pursuant to the provisions of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to state court proceedings by the Fourteenth Amendment to the United States Constitution. Those amendments provide in parts relevant to this Petition as follows:

> Congress shall make no law.....abridging the freedom of speech or of the press
>
> * * * *
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or library or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Reginald Cooke is an attorney at law who at all times material to this petition was self-employed as a sole practitioner in Columbus, Ohio. In February of 1996 the President of the Columbus Urban League, Samuel Gresham, contacted Cooke and asked Cooke if he would consider representing two African-American individuals who were pursuing claims that their former employer, United Dairy Farmers, Inc., had terminated their employments due to their race. United Dairy Farmers, Inc. owns and operates in excess of two hundred convenience stores in Ohio and adjacent states, approximately sixty of which are located in the Columbus, Ohio area, and former employees Maudie Williams and her son Michael Williams had been previously employed at a United Dairy Farmers store in Columbus.

Commencing in mid-1995, the Williamses were represented by another attorney, Daniel Klos, who assisted them in filing race discrimination complaints with the Ohio Civil Rights Commission. Attorney Klos announced his intention to withdraw as the Williams' counsel in late 1995, and in February of 1996 the Ohio Civil Rights Commission issued a determination that Maudie Williams' race discrimination complaint was supported by probable cause. Pursuant to Maudie Williams' request that Mr. Gresham assist her in locating an attorney who was willing to represent her, Samuel Gresham contacted Cooke shortly after the issuance of that probable cause determination.

Cooke first met with the Williamses on February 12,1996, and agreed to represent them. Cooke then represented the Williamses in United Dairy Farmers' unsuccessful appeal of the Ohio Civil Rights Commission's probable cause determination, and in a subsequently-filed civil action, Case

No. C2-98-1060, in the United States District Court for the Southern District of Ohio, Eastern Division.

The Ohio Civil Rights Commission's probable cause determination was in large measure based on the testimony of two individuals, store manager Deborah Ferguson, who had been Maudie Williams' supervisor during her employment at United Dairy Farmers, and an assistant store manager named Patricia Munyan:

> *** Deborah Ferguson, White, was the Manager when Charging Party was discharged.***
>
> Ferguson stated that Glenn Broesma, White, District Supervisor, told her "not to hire any more fucking niggers" in that store. Broesma wanted Ferguson to write Charging Party [Maudie Williams] up "for everything she did" because "he was building a case to fire her." Broesma said that respondent [UDF] was changing supervisors and that [UDF Supervisor] William Bales, White, "would not put up with charging Party's shit and he'll make sure she's fired." Bales "rode (Charging Party) real bad." After two black employees were discharged for stealing, Bales said "You see what happens when you hire them in here, they rip the store off."
>
> Patricia Munyan, White, was the Assistant Manager when Charging Party worked for Respondent.*** She recalled that Broesma and Bales told Ferguson to write Charging Party up "for anything she possible could so (Charging Party) would be terminated." She heard Broesma say "not to hire any more fucking niggers because all they do is steal."

In the aftermath of the Ohio Civil Rights Commission's findings, the Williams' discrimination claims garnered the attention of the local Ohio media. While Cooke was involved in planning several press conferences involving the Williamses, which he attended, the record of this case does not describe a single statement that Cooke made to the press.

United Dairy Farmers aggressively denied the Williams' discrimination claims, and in December of 1996 hired a public relations firm, Edward Howard & Company, to publicly advocate and disseminate those denials.

During the months following the Ohio Civil Rights Commission's probable cause determination, Cooke was contacted by a large number of United Dairy Farmers employees, former employees, employment applicants, and customers who had either witnessed allegedly discriminatory activity or sought to pursue race discrimination claims against United Dairy Farmers, and in October of 1997 the Columbus Community Relations Commission issued a finding that probable cause existed to believe that the City of Columbus' criminal race discrimination law had been violated by both United Dairy Farmers, Inc. and a United Dairy Farmers store manager named Colleen Cheadle. During that same month, Cooke filed a second federal court action against United Dairy Farmers and a its district managers, Case No. C2-97-1071, on behalf of seven additional claimants.

United Dairy Farmers was initially defended by attorney Brian Gillan of the Cincinnati-based law firm of Dinsmore & Shohl, who represented UDF in its appeal of the Ohio Civil Rights Commission findings in Maudie Williams' case, and in the defense of the two federal court actions in which Cooke represented the plaintiffs. United Dairy Farmers also hired attorney Larry James of the Columbus, Ohio law firm of

Crabbe, Brown, Jones, Potts & Schmidt, now known as Crabbe, Brown & James (hereinafter, "Crabbe, Brown"), to defend the criminal race discrimination case against former store manager Colleen Cheadle.

In early 1998 Respondent Gillan was hired by United Dairy Farmers as its Chief Operating Officer and Legal Counsel. While Gillan thereafter remained of-counsel with the Dinsmore & Shohl firm , upon accepting that employment he ceased to maintain an office at that law firm, and his duties as outside counsel were assumed by another firm attorney named Jerry Sallee. At about that same time, attorney Larry James was hired as co-counsel in the defense of the two federal court civil actions.

Unbeknownst to Cooke, in March of 1998 an individual who identified himself as "RJ" contacted United Dairy Farmers' Human Resources Manager, Alan Lirtzman, and offered to sell United Dairy Farmers a videotape which depicted former UDF assistant manager Patricia Munyan recanting her previous testimony to the Ohio Civil Rights Commission. Lirtzman conveyed the substance of that communication to Gillan and scheduled to meet with "RJ" at the Columbus, Ohio offices of the Dinsmore & Shohl law firm on April 1, 1998. Lirtzman was sufficiently apprehensive of RJ that he arranged for an employee of United Dairy Farmers' Security Division, John Osbourne, to serve as his bodyguard at that meeting.

During the April 1 meeting with RJ, Lirtzman and Osbourne viewed a 10-minute long homemade videotape which depicted Patricia Munyan watching television and telling RJ, who was apparently her boyfriend, that she had fabricated her previous testimony to the Ohio Civil Rights Commission during its investigation of Maudie Williams'

complaint. After Lirtzman viewed that videotape, he informed RJ that United Dairy Farmers was not willing to purchase the tape at that time, and that others would have to view the tape and decide whether or not to purchase it.

A second meeting with RJ was held at Dinsmore & Shohl's offices on April 6, 1998, and was attended by RJ, Lirtzman, Gillan, James, and attorney Jerry Sallee. During that meeting the videotape was again played and RJ made certain statements concerning the provenance of the videotape, after which Gillan, James and Sallee collectively decided, on United Dairy Farmers' behalf, to purchase the tape.

Immediately following that decision, Gillan drafted an affidavit for RJ's signature, obtained cash from a local bank, returned to the meeting and required RJ to disclose his true name and produce his driver's license. RJ stated that his real name was Warren Freeman, Jr., and in lieu of a driver's license produced a State of Ohio identification card which confirmed that he was in fact Warren Freeman, Jr., age 24. Gillan then obtained Freeman's signature on the affidavit and paid Freeman $7,500.00 of the agreed-upon $10,000.00 price for the tape. The $2,500 balance of the purchase price was withheld at that time in order to assure that Freeman "would be available to testify if needed."

At the conclusion of or very shortly after the April 6, 1998 meeting, Gillan instructed James to conduct a criminal background check on Warren Freeman, Jr., and James in turn instructed an attorney at his office to conduct the first of two such investigations of Freeman's criminal record. That background check, which was completed in approximately mid-April and limited in scope to the court records of Franklin County, Ohio, disclosed that since attaining the age

of majority, Freeman had been convicted of approximately one-dozen separate felony and misdemeanor charges, including several theft convictions and a conviction on charges of obstruction of justice.

While Freeman stated in his April 6, 1998 affidavit that he recorded the video tape without Munyan's knowledge, the tape contains numerous indicia that it was the product of a collaborative effort between Freeman and Munyan.

While Freeman stated in his affidavit that he made the tape by hiding a video camera in a laundry basket under a pile of dirty laundry, the video image depicted on the tape shows that the video camera was perfectly level while the tape was recorded, and that the video image is not obscured by laundry or any part of a laundry basket. The volume and unmuffled audio quality of the tape also suggest that the camera's microphone was not buried under a pile of laundry when the recording was made.

On the videotape, Munyan enters the camera's field of view, assumes a position on a mattress facing the camera and almost perfectly centered in the camera's field of view, recants her previous testimony, then exits the picture. While it is unclear who turned the camera on and off, the images and voices on the tape reasonably establish that the camera was not turned on or off by Freeman.

The context of the recorded conversation also warrants mention. While Freeman stated in his affidavit that he had been involved with Munyan for approximately one year before he recorded the tape, the videotape depicts Munyan telling Freeman about her involvement in the Williams' race discrimination cases as if she had never previously mentioned

her involvement in those newsworthy events at any prior point in time.

The substance of Munyan's videotape statements is of particular importance to this appeal. On the videotape, Munyan's recantation of her previous testimony consists of the following statement:

> ***Maudie just cause[d] a bunch of trouble. And she talked to me and asked me to go on the Civil Rights Commission and said whatever she gets she'll split. All I had to do was what her and her lawyer said, and that's what I did.***

Munyan's statement expressly exonerates Petitioner from any suggestion that he was involved in any scheme to bribe Munyan to give false testimony, because as Respondents have admitted in the underlying proceedings, Petitioner didn't represent and had in fact never met or heard of Maudie or Michael Williams until February of 1996, after the Ohio Civil Rights Commission had obtained Munyan's testimony and issued its probable cause finding. Respondent Gillan, who was United Dairy Farmers' COO and Legal Counsel at the time of the press conference, personally knew as much due to his representation of United Dairy Farmers and his direct communications with the Williams' prior counsel, Daniel Klos.

Shortly after Respondents learned of Freeman's criminal record, Gillan and James paid Freeman the remaining $2,500 of the videotape purchase price, and delivered the tape to the Edward Howard & Company public relations firm.

During late April and May of 1998, United Dairy Farmers expended over $30,000 planning and orchestrating a press

conference featuring the Munyan videotape. That press conference, which was held on June 4, 1998, was attended by a large number of reporters, including representatives of every major media outlet in the Columbus and Cincinnati areas, and reporters from the Associated Press (AP) national/international news wire service.

During that press conference Respondents repeatedly stated, in spoken remarks and in written "press packet" materials which were widely distributed during and after the press conference, that Petitioner and Maudie Williams had entered into an agreement with Munyan, under the terms of which Munyan agreed to testify falsely in exchange for a percentage of the money that Maudie Williams and Petitioner "anticipated receiving in an out-of-court settlement from United Dairy Farmers." (The "press packet" documents are included as Appendix F at 95a-138a). In addition, during the press conference Respondents repeatedly stated that Petitioner represented Maudie and Michael Williams during 1995 before, rather than after, Patricia Munyan testified to the Ohio Civil Rights Commission. On the strength of those statements Respondents further stated, inter alia, that the Munyan videotape "conclusively proved" that Petitioner had engaged in "an illegal and unethical scheme" to force United Dairy Farmers to settle the "bogus claims" of Maudie and Michael Williams, and that Petitioner's "fraud was cast in phony racial discrimination language" because Petitioner and his client "all thought that would be an easy way to force money from the company." Petitioner was mentioned in Respondent Gillan's press conference remarks on thirty-seven separate occasions.

Respondents' press conference allegations were widely reported in the days and weeks following the press

conference, and Petitioner was mentioned unfavorably in virtually all of those news reports.

The Munyan videotape was played and admitted into evidence during the *Williams v. United Dairy Farmers trial*, and the jury returned a verdict for the defendants. While the trial judge subsequently ordered a new trial based upon his determination that the Munyan videotape was fabricated, that trial also resulted in a verdict for the defendants. However, the *Johnson v. United Dairy Farmers* case (Case No. 2:97CV-1071) came to trial in May of 1999 and resulted in a unanimous jury verdict awarding both compensatory and punitive damages in favor of three of the five plaintiffs whose discrimination claims proceeded to trial. United Dairy Farmers appealed that verdict, but subsequently withdrew and dismissed that appeal, thus allowing that verdict and judgment to stand.

On June 3, 1999 Petitioner filed a malicious libel, malicious slander and conspiracy action in the Franklin County Court of Common Pleas against Respondents, attorney James and the Crabbe, Brown law firm. In their answers to the complaint, all of the Defendants averred, among other defenses, that "[p]laintiff is a limited purpose public figure and cannot recover without proof of actual malice." Respondent subsequently amended his complaint to add claims of negligent libel and negligent slander.

On April 24, 2001 Respondents and defendants James and Crabbe, Brown filed virtually identical motions for summary judgment in which they vigorously asserted that Cooke was a public figure and that no evidence supported the conclusion that they had published their defamatory statements with knowledge of falsity or reckless disregard for the truth. Respondent timely filed a combined memorandum in

opposition to both summary judgment motions, together with authenticated evidentiary materials, and on June 7, 2002 the trial judge issued a decision sustaining James and Crabbe, Brown's motion for summary judgment. Petitioner prosecuted an appeal of that decision to the Franklin County Court of Appeals in Appeal No. 02APE-07-0781, and on June 17, 2002 the Court of Appeals issued its decision and judgment reversing the trial court's summary judgment and remanding the case for further proceedings consistent with its opinion.

Despite the defendants' virtually identical summary judgment motions, following the Court of Appeals' remand, the trial court on July 30, 2004 issued a decision and entry sustaining Respondents' motion for summary judgment. On August 12, 2004 the trial court executed a Civil Rule 54(b) "no just reason for delay" entry relating to its July 30, 2004 decision and entry, and Petitioner timely prosecuted an appeal to the Franklin County Court of Appeals in Appeal No. 04APE-08-0817.

On March 31, 2005 the Franklin County Court of Appeals issued its opinion and judgment in Case No. 04APE-08-0817 affirming the summary judgment order of the Court of Common Pleas. While the court of appeals held that Respondents' statements concerning Petitioner were defamatory *per se*, the court, without addressing all of the Respondents' defamatory statements (which statements were set forth in the "press packet" materials which were attached to the complaint and in Petitioner's memorandum in opposition to Respondents' motion for summary judgment), held that many of those statements were non-actionable opinion under Ohio law, and that those statements which were not opinion were nevertheless non-actionable because Petitioner was a limited purpose public figure pursuant to

Gertz v. Welch and had failed to establish by clear and convincing evidence that Respondents published the statements with knowledge of falsity or reckless disregard of the truth. Petitioner thereafter timely appealed that decision to the Ohio Supreme Court, which declined jurisdiction and dismissed his appeal. This Petition ensued.

ARGUMENT FOR GRANTING WRIT

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court determined that the First Amendment, as applied to the states through the Fourteenth Amendment, limits the state law remedies which are available to a defamation plaintiff and prohibits public officials from recovering damages for a defamatory falsehood relating to their official conduct unless the plaintiff proves by clear and convincing evidence that the statement was "made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id at 279-280. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), this Court extended the application of the actual malice standard to defamation cases prosecuted by public figures, and in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), a libel case involving a practicing attorney, this Court, noting that it was constrained by practical considerations to lay down only "broad rules of general application," *id.* at 343-344, extended public figure status and the commensurate requirement of proof of actual malice by clear and convincing evidence, to those individuals who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

Unfortunately, the exceedingly general rule enunciated in *Gertz v. Welch* provides only nominal guidance to attorneys who are called upon to accept representation in newsworthy

cases, and directly conflicts with their ethical duty to zealously represent their clients within the bounds of the law. This case graphically illustrates the need for a rule which more specifically applies to the nation's one million practicing lawyers who stand in jeopardy of forfeiting the right to protect their reputations and livelihoods in the course of fulfilling their obligations as officers of the courts in which they practice.

The Code of Professional Responsibility of the Supreme Court of Ohio, which is based on the Model Rules of Professional Conduct promulgated by the American Bar Association, defines the ethical responsibilities of attorneys who practice in Ohio's courts. Canon 2 of the Code of Professional Responsibility states that "[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available," and embraces the concept that attorneys should not decline representation in cases which generate controversy or challenge the dominant power structure. Canon 7 of the Code of Professional Responsibility states that "[a] lawyer should represent a client zealously within the bounds of the law," and Ethical Consideration 7-1 emphasizes that that Canon imposes on every lawyer an affirmative obligation to achieve his client's lawful objectives, including the adjudication of any lawful claim, by all legally permissible means. Short of violating the law, an attorney is ethically required to do all that he can to achieve the best possible outcome for his client.

While an attorney's communications with the media concerning a pending case may prevent prospective jurors from being impartial and may also interfere with the obligation of jurors to base their verdicts solely upon the evidence admitted at trial, such communications may also assist the judicial process by providing notice of litigation to

potential witnesses, and by counterbalancing preexisting prejudices within the jury pool. The fact that under certain circumstances attorneys do and will communicate with the media is recognized and addressed in Disciplinary Rule 7-107 of the Ohio Code of Professional Responsibility, which provides in part material to this appeal:

> (A) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (B) Notwithstanding division (A) of this rule, a lawyer may state any of the following:
> (1) The claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
> (2) Information contained in a pub record;
> (3) That an investigation of a matter is in progress;
> (4) The scheduling or result of any step in litigation;
> (5) A request for assistance in obtaining evidence and information necessary to obtain evidence.

Given the ethical obligation to zealously represent clients within the bounds of the law, it is incongruous to hold that in the course of discharging that obligation an attorney should be held to have forfeited those state law protections which are extended to the overwhelming majority of private citizens under state defamation laws. In this case Petitioner's public figure status relates solely to his representation of the plaintiffs in the UDF litigation, and the record fails to contain

even a single statement that Petitioner made to the media. While the state courts ignored some of the facts, downplayed others, and misapplied the applicable precedents, Petitioner's case would not have been summarily dismissed absent his designation as a limited purpose public figure.

Unfortunately, by conferring limited purpose public figure status on Petitioner, Ohio's courts have placed the "broad rule" of *Gertz v. Welch* squarely in conflict with the ethical obligation that attorneys should represent their clients zealously within the bounds of the law. The plain and undesirable effect of that conflict is that in a myriad of situations involving newsworthy cases, lawyers are now required to choose between placing their reputations at risk on the one hand, and fulfilling their ethical obligations on the other. Petitioner respectfully submits that in such cases the attorney's ethical obligations should prevail, and that an attorney should not be subject to designation as a limited purpose public figure where the content of the attorney's statements to the media consists only of those statements which are permitted by the above-quoted provisions of Disciplinary Rule 7-107 (B)(1) through (5) of the Code of Professional Responsibility of the Supreme Court of Ohio.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the foregoing Petition for Writ of Certiorari.

Respectfully submitted,

James R. Leickly, Esq.(0038309)
Counsel of Record
326 South High Street, Suite 300
Columbus, Ohio 43215
(614) 222-0509
(614) 241-5909 fax

John A. Yaklevich, Esq. (0025588)
Moore & Yaklevich
326 South High Street, Suite 300
Columbus, Ohio 43215
(614) 241-5902
(614) 241-5909 fax
jayyaklevich@aol.com

Counsel for Petitioner

Date: December 7, 2005

APPENDIX A

Supreme Court of Ohio

No. 04-4011

[Filed September 7, 2005]

Cooke	)
	)
v.	)
	)
United Dairy Farmers, Inc.,	)
	)

OPINION

Appeal Not Accepted for Review.

APPENDIX B

Court of Appeals of Ohio
Tenth Appellate District

No. 04AP-817

[Filed March 31, 2005]

Reginald A. Cooke	)
Plaintiff-Appellant,	)
	)
v.	)
	)
United Dairy Farmers, Inc.,	)
Defendants-Appellees.	)
	)

Opinion

FRENCH, J.

Plaintiff-appellant, Reginald A. Cooke, appeals from a judgment of the Franklin County Court of Common Pleas that denied Cooke's motion for partial summary judgment and granted a motion for summary judgment filed by defendants-appellees, United Dairy Farmers, Inc. ("UDF") and its Chief Operating Officer and General Counsel, Brian P. Gillan, in this action alleging defamation and conspiracy. For the reasons stated below, we affirm.

In 1995, while represented by attorney Daniel Klos, Maude Williams and her son, Michael Williams, filed an employment discrimination complaint with the Ohio Civil Rights Commission ("OCRC"). Previously employed at the Frebis Avenue UDF store, the Williamses alleged that UDF had terminated their employment on the basis of race and not because of violations of the company's money-handling procedures, as UDF maintained.

In support of their claim, the Williamses presented testimony by the store's assistant manager, Patty Munyan, who averred that UDF had a discriminatory policy, and that UDF district supervisors, Glenn Broersma and Bill Bales, had directed Munyan and store manager Debbie Ferguson to discriminate against the Williamses. In 1996, when the Williamses' new attorney, Cooke, filed civil actions in federal court based upon the racial discrimination allegations, Cooke intended to call Munyan as a witness for the plaintiffs.

However, before that case proceeded to trial, Munyan's boyfriend, Warren Freeman, approached UDF with a videotape of Munyan admitting that she had fabricated her story because she hoped to obtain payment from the Williamses. UDF paid Freeman $ 10,000 for the tape, and, in June 1998, held a press conference during which Gillan showed the tape and distributed copies of the tape and a transcript of its contents to members of the press. In addition, attorney Larry James, who was outside trial counsel for UDF, attended the conference and fielded reporters' questions regarding the case.

During the press conference, Gillan accused Cooke and the Williamses of attempting to extort settlement money from UDF. A transcript of Gillan's press conference statements reads, in part:

In December, 1996, as part of their efforts to force the company to settle these claims, the Williamses and their attorney organized two days worth of virtually nonstop public demonstrations in Columbus and Cincinnati, featuring the appearance of national civil rights leader Reverend Jesse Jackson. The company was vilified for its alleged employment discrimination policies in general. However, very specific and very public demands were made for the company to settle the lawsuit for a monetary payment. It was made very clear that removing the sanctions against the company--which shortly thereafter included an organized boycott and picketing--were contingent upon agreeing to this financial demand. As we will see shortly, getting that money was the critical motivating goal.

Additional pressure was brought to bear on the company when several other employees or former employees filed claims with various local, state and federal agencies claiming discrimination by the company. Six individuals filed discrimination charges with the Columbus Community Relations Commission. There was one common link in all of those filings--attorney Reggie Cooke represented all of those individuals.

Each of these developments also featured massive publicity efforts by Mr. Cooke, complete with inflammatory rhetoric that invoked the worst racial images--all in an effort to make the company reach a financial settlement of the $ 17 million lawsuits.

After showing the videotape to those gathered at the press conference, Gillan stated, in part:

Let's review some of the key points we have just heard and seen.

* * *

Ms. Munyan rationalized why it was okay for her to lie:

"Well, at the time that I did it I thought I was doing the right thing and I thought a little lie wouldn't hurt. I didn't know it was going to be all this. Because when I talked to Reggie (Cooke) and them about it they said, Oh, they'll settle quick."

As that segment reveals, the Williamses' attorney--Mr. Cooke–was a key part of this scheme. She also had this to say about him:

"Well, <he> told me he was going to make me rich, but I ain't seen no money yet."

Ms. Munyan described why she was living in the apartment and her dissatisfaction with it:

"That's the only reason I'm here, the Williams stuff. He's (Reggie Cooke) afraid I'm going to go someplace else and he won't have me for the case. * * * Then Reggie got me this apartment the other day and told me that--to be ready to go to court. I'm pretty sure it's in July. They'll go to court the only thing that's going to happen is they're going to get their money and <expletive> Patty. That's how it's gonna be.

* * *

It is clear from this tape that Ms. Munyan has willingly participated in a gigantic fraud against United Dairy Farmers, the judicial system, and the people of Columbus. This fraud was cast in phony racial discrimination language because she, the plaintiffs and their attorney all thought that would be an easy way to force money from the company. Had we settled the case, as we were repeatedly pressured and threatened to do, they would have gotten away with it. Today, their fraud has been unmasked.

As a result of these developments, we have taken the following steps:

* Motions have been filed in United States District Court supplementing our previous request to find in favor of United Dairy Farmers and dismiss the actions against the company.

* Those motions also request legal sanctions against the Williamses and their attorney, Reggie Cooke, for their gross abuse of the judicial system.

* We also have asked that the Court order the plaintiffs and their attorney to pay the attorneys' fees and other expenses that United Dairy Farmers has incurred as a direct result of the knowingly false claims that were made against the company.

* The videotape evidence of Ms. Munyan's admission that she lied has been delivered to the City Attorney's office to help show that any action against the former store manager, Colleen Cheadle, should be dismissed.

* Ms. Munyan's admitted perjury has been brought to the attention of appropriate legal authorities so they can determine if she should be prosecuted for her role in these matters.

In September 1998, as part of its defense in the federal court case, UDF presented the videotape and related arguments to the jury, which found in favor of UDF and related parties. See *Williams v. United Dairy Farmers* (1999), 188 F.R.D. 266.

In 1999, Cooke sued UDF, Gillan, James, and James' law firm, Crabbe, Brown, Jones, Potts and Schmidt, for defamation and related causes. In his complaint, Cooke objected to Gillan's statements during the press conference, specifically protesting that:

> 27. Gillan stated to the members of the media gathered at the event that "the attacks against UDF over the last 1 and ½ years are false" and that they "were a part of an unethical and illegal scheme to get money from the company."
>
> 28. Next Gillan stated that Cooke "cynically helped orchestrate this campaign for his own financial gain, fanned the flames with his racial rhetoric to force the company to settle these bogus claims."
>
> 29. Gillan then falsely placed Cooke back in time to 1995, --the period when the plotting of the alleged illegal scheme between Munyan and Maudie Williams occurred. Gillan said "approximately three years ago * * * Ms. Williams and her son--who now were represented by attorney Reginald Cooke--filed charges with the Ohio Civil Rights Commission."

> 30. After stating that Munyan was involved in a scheme to lie for money, Gillan added that "the Williamses' attorney--Mr. Cooke--was a key part of this scheme."

In addition to these claims regarding Gillan's speech at the press conference, Cooke's complaint also charged defamation in Gillan's distribution of written materials containing identical allegations against Cooke.

In Count 31, Cooke accused James of defamation based upon James' comments regarding a duty to report Cooke's alleged wrongful conduct to the Office of the Disciplinary Counsel for the Supreme Court of Ohio. Presented with a separate motion for summary judgment by James and his law firm, the trial court granted summary judgment in favor of those two defendants in June 2002. The court found that James' comment was a statement of opinion and so was protected, and that Cooke produced no evidence that James conspired with UDF or Gillan to defame Cooke or from which James or his firm could be held liable for UDF/Gillan statements.

In *Cooke v. United Dairy Farmers*, Franklin App. No. 02AP-781, 2003 Ohio 3118 ("*Cooke I*"), this court reversed in a split decision, determining that the evidence suggested that James helped plan and participated in the press conference, and that he filed federal court documents that morning containing virtually the same allegations as those raised in the press conference. Thus, we held that a question of fact remained as to whether James was sufficiently involved in preparing for and holding the press conference that he could be held liable along with UDF and Gillan for any defamatory content. Addressing James' statement during the press conference that he had an obligation to report Cooke's

conduct to the Ohio Supreme Court's Disciplinary Counsel, we found that, because James used language that was value laden and represented a subjective viewpoint, James was expressing an opinion that was constitutionally protected. However, because we found that participation in the conference exposed James to liability for any defamatory statements by Gillan and UDF, we reversed summary judgment in favor of James and his firm, and remanded the matter for further determination by the trial court.[1]

Regarding Cooke's claim against UDF and Gillan, in July 2004, the trial court issued its decision and entry denying Cooke's motion for partial summary judgment and granting UDF and Gillan's motion for summary judgment. In its decision, the court:

1. Agreed with Cooke that the spoken and written words by UDF and Gillan constituted defamation per se because the accusation that Cooke asked a witness to testify falsely would tend to injure Cooke in his occupation as an attorney, who, as an officer of the court, is sworn to uphold the law.

2. Found, however, that UDF and Gillan are entitled to a qualified or conditional privilege because their statements involved a matter of public concern, the publication was in good faith, and they had a legal and ethical obligation to expose potential attorney misconduct.

3. Held that Cooke was unable to establish actual malice because, at the time of the press conference, UDF and Gillan

---

[1] The record currently before us does not disclose any further action on remand as to Cooke's complaint as to James and his law firm.

had a subjective belief that Munyan was telling the truth on the tape, thus, they would not have been aware of a high probability of falsity of their statements.

4. Determined that Cooke's conspiracy claim was unsupported because there was no basis for an underlying claim of defamation.

Cooke now raises the following assignments of error:

Assignment of Error No. 1

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES UNITED DAIRY FARMERS, INC. AND GILLAN ON GROUNDS OF AN AFFIRMATIVE DEFENSE WHICH DEFENDANTS-APPELLEES NEVER ASSERTED IN THIS ACTION.

Assignment of Error No. 2

THE TRIAL COURT'S DECISION AND ENTRY GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT IS IN DIRECT CONFLICT WITH THIS COURT'S PREVIOUS OPINION AND MANDATE IN THIS CASE, AND IS ACCORDINGLY IN ERROR.

Assignment of Error No. 3

THE TRIAL COURT ERRED IN ITS DECISION SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S DEFAMATION CLAIMS BECAUSE GENUINE

ISSUES OF MATERIAL FACT EXISTED AND APPELLEES WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON GROUNDS OF THE UNPLEADED DEFENSE OF QUALIFIED PRIVILEGE.

Assignment of Error No. 4

THE TRIAL COURT ERRED IN ITS DECISION SUSTAINING DEFENDANTS-APPELLEES' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CONSPIRACY CLAIM BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED AND APPELLEES WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Assignment of Error No. 5

THE TRIAL COURT ERRED IN ITS DECISION OVERRULING PLAINTIFF-APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App. 3d 158, 162, 703 N.E.2d 841. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103, 701 N.E.2d 383. Civ.R. 56(c) provides that summary judgment may be granted when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to

the party against whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St. 3d 181, 183, 1997 Ohio 221, 677 N.E.2d 343.

When proper evidence supports a motion for summary judgment, a non-moving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing a genuine triable issue. Civ.R. 56(E); *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027. To establish the existence of a genuine issue of material fact, the non-moving party must do more than simply resist the allegations in the motion. Rather, that party must affirmatively set forth facts entitling him to relief. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111, 570 N.E.2d 1095. If the non-moving party "does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E).

Pursuant to Section 11, Article I of the Ohio Constitution: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." The Ohio Supreme Court has recognized that the Ohio Constitution protects expressions of opinion as a valid exercise of freedom of the press. *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 244-245, 25 Ohio B. 302, 496 N.E.2d 699.

In *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 281-282, 1995 Ohio 187, 649 N.E.2d 182, the court applied a totality of the circumstances test for determining whether speech is protected opinion, stating that a court should consider "the specific language at issue, whether the statement is verifiable, the general context of the

statement, and the broader context in which the statement appeared." Id. at syllabus. Thus, in *Vail*, where the statements were made in a column labeled "commentary" and printed on the Forum page of the newspaper, the reader would have received the message that the statements were opinion. In addition, the court looked at whether the column was characterized as objective facts or subjective hyperbole, and concluded the "general tenor of the column" was "sarcastic, more typical of persuasive speech than factual reporting." Id. at 282. The court analyzed the specific language to determine "whether a reasonable reader would view the words used to be language that normally conveys information of a factual nature or hype and opinion." Id. Finally, the court looked at whether the statements were verifiable, asking whether the author implied that he had first-hand knowledge that substantiated his opinions. Quoting *Scott*, the court stated that, where the statement lacks a plausible method of verification, the reasonable reader will not believe the statement has specific factual content. Id. at 283.

In *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003 Ohio 3668, 792 N.E.2d 781, the First District Court of Appeals applied Vail's totality of the circumstances test to a defamation suit in which the plaintiff claimed that members of a civil rights organization had falsely accused police of "killing, raping, [and] planting false evidence." Id. at ¶4. The court in *Jorg* recognized that, even though the statements were unambiguous and could be interpreted as facts, and additionally were verifiable and capable of proof, the context of the statements militated against a finding of actionable defamation:

> Considering the allegedly defamatory statements in the context of the entire letter, we are convinced that the average reader would be unlikely to infer that the

> statements were meant to be factual. The entire letter was a call to action and meant to cause outrage in the reader. * * *
>
> With the letter viewed as a whole, it is obvious that it was meant to be persuasive. As the trial court concluded, it was advocacy, not objective news. The letter was seeking support for "travel and tourism sanctions against the Cincinnati area" and clearly stated this purpose in bold type in the first paragraph. * * * The average reader viewing the allegedly defamatory words in the context of the entire letter would have been hard-pressed to accept [the] statements as impartial reporting. We conclude that, under this factor, the statements would most likely be regarded as opinion, not fact * * *.

Id. at ¶20-21.

In this matter, Cooke specifically objects to several statements. First, Count 27 of his complaint charges defamation in Gillan's statements that "the attacks against UDF over the last 1 and ½ years are false" and that they "were a part of an unethical and illegal scheme to get money from the company." The language describes Cooke's actions against UDF as "attacks," and refers to the plan as a "scheme" that is described as "unethical and illegal," all value-laden words. By using the word "attacks" instead of "charges," "scheme" instead of "plan," and "unethical and illegal" instead of merely "improper" or "objectionable," Gillan added rhetorical hyperbole that would suggest to the listener that this is UDF's and/or Gillan's interpretation of Cooke's conduct. Similarly, Count 28 of the complaint finds fault with Gillan's statement that Cooke "cynically helped orchestrate this campaign for his own financial gain, fanned

the flames with his racial rhetoric to force the company to settle these bogus claims." Gillan's choice of words and phrases like "cynically," "fanned the flames" and "bogus" suggests opinion because these words are intended to express UDF's outrage at being, as Gillan put it, the victim of a "gigantic fraud." Thus, these statements were also clearly opinion.

In addition, the statements are not verifiable. Statements lacking a plausible method of verification are more obviously opinion because they do not rest upon either implied or explicit fact. See *Condit v. Clermont Cty. Review* (1996), 110 Ohio App.3d 755, 760-761, 675 N.E.2d 475. Finally, viewed in the broader context of Gillan's stated purpose for the press conference--to counter the negative publicity engendered by the Williamses' claims of racial discrimination by publicly presenting exculpatory evidence--Gillan clearly considered himself to be "fighting fire with fire" by attempting to try the case in the court of public opinion. As we stated in *Cooke I*, at ¶42: "The broader context of the statement was the press conference in which UDF was defending itself in the media against claims of racial discrimination, and accusing Cooke of orchestrating a campaign based on fabrications." Considering all of the surrounding circumstances, we find that the statements contained in Counts 27 and 28 of Cooke's complaint were clearly Gillan's opinion, and not actionable defamation.

In Count 30, Cooke points to Gillan's statement that Cooke was "a key part" of Munyan's scheme to lie for money, a statement that is not verifiable, because both Cooke and UDF could have been unwitting victims of Munyan's plan to lie to the highest bidder. Moreover, in the context of the entire press conference, which was expressly intended to persuade the public that UDF was innocent of the racial

discrimination charges lodged against it, Gillan's statement that Cooke was a "key part" of Munyan's scheme would be interpreted by the average listener as UDF and Gillan's opinion that Cooke knew Munyan had lied. Thus, the statement contained in Count 30 also was not actionable defamation.

In Count 29, Cooke complains that Gillan falsely linked Cooke to the Williamses as early as their filing of the complaint before the Ohio Civil Rights Commission in 1995, a period during which Cooke did not represent the Williamses. Gillan said, "approximately three years ago * * * Ms. Williams and her son--who now were represented by attorney Reginald Cooke--filed charges with the Ohio Civil Rights Commission."

The statement that Cooke represented the Williamses during their initial complaint before the OCRC does not qualify as opinion. First, court or other records demonstrate when, in fact, Cooke's representation began. Thus, the statement is verifiable. In addition, the immediate context in which that statement was made suggests Gillan intended it to be taken as fact. This segment of the transcript of the press conference reads:

> We need to go back in time to get the perspective that is needed to understand the importance of today's evidence and the reasons why it topples the house of cards that has been constructed.
>
> Approximately three years ago, two former employees of the United Dairy Farmers store at Frebis and Fairwood were fired for "violating company cash-handling procedures." These two individuals--Maudie Williams and her son Michael Williams--had

> previously received warnings concerning their conduct on the job. They admitted--in writing--that they had not followed explicit procedures developed to ensure that the cash at the store is safeguarded. Both Ms. Williams and her son are African-American, but they made no claim at the time that their termination was racially motivated.
>
> After several months had passed, both Ms. Williams and her son--*who now were represented by attorney Reginald Cooke*--filed charges with the Ohio Civil Rights Commission. Two different investigators were assigned to the charges and the agency essentially reached split decisions on what amounted to the same evidence in each case.
>
> The Williamses and their attorney next filed two lawsuits in federal court seeking approximately $ 17 million in damages. They claimed that their employment had been terminated because of their race rather than due to their admitted violations of company procedures.

(Emphasis added.)

The statement appeared amid factual, verifiable information explicitly intended to give the listener a history of the Williamses' case against UDF. All of the statements immediately surrounding the assertion that Cooke represented the Williamses at the time of the OCRC action were factual, or, at least, capable of verification. Thus, the listener would have inferred that the statement about Cooke also was factual. Moreover, as the court recognized in *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 131, 2001 Ohio 1293, 752 N.E.2d 962, quoting *Ollman v. Evans* (C.A.D.C.1984), 242 U.S.

App. D.C. 301, 750 F.2d 970, 983, " 'some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact.' ' While other statements statement did not send that signal.'"

Thus, we conclude that the statement that Cooke represented the Williamses in their action before the OCRC was not opinion.

In *Cooke I*, we stated, at ¶24:

> Defamation, which includes both libel and slander, is a false publication causing injury to a person's reputation, exposing the person to public hatred, contempt, ridicule, shame, or disgrace, or affecting the person adversely in his or her trade or business. *Knowles v. Ohio State Univ.*, Franklin App. No. 02AP-527, 2002 Ohio 6962; *Sweitzer v. Outlet Communications, Inc.* (1999), 133 Ohio App.3d 102, 108, 726 N.E.2d 1084 * * *. To establish defamation, a plaintiff must show: (1) the defendant made a false statement, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff was injured as a result of the statement, and (5) the defendant acted with the required degree of fault. *Sweitzer*, supra.

The evidence before the trial court demonstrates the falsity of Gillan's statement that Cooke represented the Williamses at the time of the OCRC proceedings. Supporting as it does UDF and Gillan's contention that Cooke knowingly pursued false charges of racial discrimination against UDF, the statement would tend to injure Cooke in his trade, and so was defamatory. There is no dispute that the statement was published. However, Cooke's evidence has failed to raise a

genuine issue of fact as to whether UDF and Gillan acted with the required degree of fault.

"A limited-purpose public figure is one who becomes a public figure for a specific range of issues by being drawn into or voluntarily injecting himself into a specific public controversy." *Feather stone v. CM Media, Inc.*, Franklin App. No. 02AP-65, 2002 Ohio 6747, at P27, following *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997. To determine whether a person is a limited-purpose public figure, we must examine (1) the person's participation in the controversy from which the alleged defamation arose; and (2) whether that person has attained a general notoriety in the community as a result of that participation. *Talley v. WHIO TV-7* (1998), 131 Ohio App.3d 164, 170, 722 N.E.2d 103. If an individual is a limited-purpose public figure, courts apply the same standard of proof for defamation as was set forth in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710. In other words, to prove defamation, a public-figure plaintiff must show "actual malice" on the part of the defendant in publishing the false statement, and must do so by clear and convincing evidence. Id.; *Gertz* at 342.

The facts in this case demonstrate that Cooke was a limited-purpose public figure. First, he participated in the controversy from which the defamation arose.

Cooke's deposition describes at length the efforts he made to publicize the allegations of racial discrimination lodged against UDF. He held multiple press conferences, fielded telephone calls from the media asking him to comment on the case, appeared on radio programs and at community organization meetings, and obtained the assistance of Reverend Jesse Jackson, a nationally-known figure whose

support immediately attracted the attention of the national news media. As a result of these publicity efforts, Cooke attained a general notoriety in the community.

Based upon these facts, we find that Cooke was a limited-purpose public figure. Therefore, in order to prevail on his defamation claim, he had to show, by clear and convincing evidence, that UDF and Gillan acted with actual malice in stating that he represented the Williamses at the time of their initial complaint before the OCRC.

A statement is made with "actual malice" where the publisher knew that the statement was false or had a reckless disregard of whether it was false or not. *Burns v. Rice*, 157 Ohio App. 3d 620, 2004 Ohio 3228, at ¶22, 813 N.E.2d 25, citing *New York Times*. Here, to establish reckless disregard, Cooke had to present clear and convincing evidence that, at the time of publication, UDF and Gillan's false statement was made with a high degree of awareness of its falsity. Id. Thus, we look to the evidence before the trial court to determine whether there was evidence that Gillan knew Cooke was not the Williamses' counsel at the time of the OCRC complaint. In his deposition, Gillan testified that his interpretation of various statements by Munyan on the videotape led him to conclude that Munyan was referring to Cooke as the attorney who was assisting the Williamses at the time of the OCRC proceedings. The following exchange occurred:

> Q. I think from the fact sheet, that we're all pretty sure that it was March of 1995 that Maudie and Michael Williams filed charges with the Ohio Civil Rights Commission; correct?
>
> A. Correct. But you have to understand for the process and my understanding of what I heard on the

videotape, I was not relating it to simply the filing of charges. The OCRC process took several years.

Early on in that process Mr. Cooke made an appearance. I understood Ms. Munyan in the videotape to be referring to her testimony during that process. She was deposed at least once. So my understanding was not simply that it related in time to March of '95.

* * *

Q. So you knew that Patty Munyan had given a statement describing, in essence, a racially-hostile environment at the Frebis store prior to the time that Reginald Cooke commenced representation of the Williamses; correct?

A. Well, no. Again, as I testified this morning, I was not at all clear exactly when Reggie Cooke began representing the Williamses.

Q. So what you're telling me is that you thought that Reginald Cooke might have begun representing the Williamses before he sent you a letter telling you that he was representing the Williamses; is that correct?

A. Yes.

Q. Did you have any reason to believe that Reginald Cooke had begun to represent the Williamses before he said he was representing the Williamses?

A. Well, at the time what I knew was there was, to my mind, confusion around who exactly represented the Williamses. Mrs. Williams had apparently identified

> Dan Klos. Dan Klos had disavowed a--at least a formal representational arrangement. Reggie Cooke had, within a week or so after I received something from the OCRC on which Dan Klos was copied, sent a letter making his own demand; so when exactly his representation began, I did not know and I do not know to this day.
>
> Q. Were you in the possession of any information whatsoever that suggested to you that Reginald Cooke was representing the Williamses prior to the conclusion of the OCRC investigation?

* * *

> A. My state of knowledge as of February 1996 is as I've testified to a couple of times, but I did not think of the OCRC process as having terminated with the issuance of a complaint or the conclusion of the evidence of the charge. It simply went to another level; that is, issuance of the complaint and then litigation around the complaint. So at some point in there Reggie Cooke was involved, but I didn't tie it to any particular action by the OCRC.

(Depo. at 101-102, 106-108.)

Based upon these statements, we find that Cooke failed to raise a genuine issue of material fact as to whether Gillan acted with actual malice in stating that Cooke represented the Williamses at the time of the OCRC complaint. Gillan's deposition does Cooke's evidence does not support a finding of actual malice, he cannot prevail on his defamation claim, and the trial court properly concluded that UDF and Gillan were entitled to judgment as a matter of law.

We additionally find that, even if Cooke's evidence demonstrated actual malice, there was no evidence of damages. Asked about damages during his deposition, Cooke stated:

> A. I filed this claim as a per se defamation for damages I presume. So I will not be presenting evidence about business and credit. I won't be presenting evidence regarding that.

* * *

> Q. So how have you been damaged in your business?
>
> A. Let me say that I've been accused by--I've been accused by you and UDF and Larry James, Mr. Gillan of fraud, suborning perjury, of criminal extortion. I can't prove one way or the other whether I've--I can't prove that. All I know is that anyone in my profession, who--an attorney's reputation is his stock in trade, that that type of onslaught will impact him. I can't prove it, I don't have any statistics, I haven't done any research. So that's all I can say.
>
> Q. Has your income gone down as a result of this press conference?
>
> A. I have no information to show that.
>
> Q. What credit were you denied?
>
> A. I have no information on being denied credit.

(Depo. at 183-184.)

In summary, we find that most of Gillan's statements qualified as opinion, but his statement regarding the actual time Cooke began representing the Williamses was not opinion but intended to be taken as fact. Nevertheless, because Cooke was a limited-purpose public figure, Cooke had to show that Gillan made the statement with actual malice, meaning with knowledge that the statement was false or with a reckless disregard as to its falsity. Cooke did not raise a genuine issue of fact as to whether Gillan made the statement with actual malice, and even if he did, Cooke had no evidence of damages. Thus, Cooke was not able to overcome the motion for summary judgment.

Based upon these considerations, we find the trial court did not err in granting summary judgment in favor of UDF and Gillan, albeit on different grounds. We will now address Cooke's assignments of error.

Cooke's first and third assignments of error raise issue with the trial court's determination that, even though some of Gillan's press conference statements constituted defamation per se, these statements were entitled to a privilege, thus UDF and Gillan were not liable. According to Cooke, appellees did not properly raise privilege as a defense and, even if they did, the statements were not privileged. However, we find we need not reach the issue of privilege because of our finding that Gillan's statements either were opinion or, if fact, were not published with actual malice. Therefore, we overrule Cooke's first and third assignments of error as moot.

Cooke's second assignment of error asserts that the trial court's decision is in direct conflict with our conclusions in *Cooke I*. However, *Cooke I* did not ultimately establish that any conduct of any of the defendant parties did, in fact, constitute defamation. We stated, at ¶37-38:

> * * * James' participation in pre-conference discussions, combined with his filing the court document and his presence at the press conference, suggests James was aware of the substance of the press conference, agreed to the common understanding, filed a document in court reflecting the common understanding, and participated in the conference with that understanding.
>
> *We readily acknowledge that our determination of Cooke's assignment of error does not indicate Cooke ultimately will prevail. Rather, we determine only that the facts the parties presented create a genuine issue of material fact for the jury to resolve.*

(Emphasis added.)

In *Cooke I*, we simply stated that Cooke had presented sufficient evidence to survive summary judgment. *Cooke I* is not "the law of the case" on the issue of whether Cooke is a limited-purpose public figure or on whether Cooke presented clear and convincing evidence of actual malice. Therefore, we overrule Cooke's second assignment of error.

Cooke's fourth assignment of error argues that the trial court should have denied UDF/Gillan's motion for summary judgment on Cooke's conspiracy claim. As we stated in *Cooke I*, at ¶26, civil conspiracy is " 'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.' " Id., quoting *Kenty v. TransAmerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 419, 1995 Ohio 61, 650 N.E.2d 863. As noted by the trial court, a claim of civil conspiracy derives from and depends upon the plaintiff's successful prosecution of the underlying claim for defamation.

Burns at ¶56. Because we find that Cooke's defamation action fails, so does his conspiracy claim. Therefore, we overrule Cooke's fourth assignment of error.

Cooke's fifth assignment of error charges that the trial court erred in overruling his motion for partial summary judgment, by which he sought a finding that statements made during the press conference were defamation per se. By this assignment of error, Cooke essentially reiterates his other arguments that privilege was not properly pled, and that the evidence supported his defamation claim, thus he was entitled to partial summary judgment because no genuine issue of fact remained for trial. Based upon our disposition of the case, we find this argument not well-taken, and we overrule Cooke's fifth assignment of error.

Having overruled Cooke's five assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

PETREE and McGRATH, JJ., concur.

Court of Appeals of Ohio
Tenth Appellate District

No. 04AP-817

[Filed March 31, 2005]

Reginald A. Cooke	)
Plaintiff-Appellant,	)
	)
v.	)
	)
United Dairy Farmers, Inc.,	)
Defendants-Appellees.	)
	)

Judgement Entry

For the reasons stated in the opinion of this court rendered herein on March 31, 2005, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

FRENCH, PETREE and McGRATH, JJ.

By: /s/ _____
Judge Judith L. French

APPENDIX C

Court of Common Pleas
Franklin County, Ohio
Civil Division

No. 99-CVC-06-4512

[Filed April 23 and 24, 2005]

Reginald A. Cooke	)
Plaintiff,	)
	)
v.	)
	)
United Dairy Farmers, Inc.,	)
Defendants.	)
	)

DECISION AND ENTRY DENYING PLAINTIFF REGINALD A. COOKE'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED APRIL 23 2001 AND GRANTING DEFENDANTS UNITED DAIRY FARMERS INC. AND BRIAN P. GILI,AN'S MOTION FOR SUMMARY JUDGMENT FILED APRIL 24, 2001

JUDGE: BESSEY

This matter is before the Court on the following motions:

- Plaintiff Reginald A. Cooke's (hereinafter "Plaintiff") April 23, 2001 Motion for Partial Summary Judgment;

- Defendants United Dairy Farmers, Inc. and Brian P. Gillan's (hereinafter collectively "Defendants UDF") May 10, 2001 Memorandum Contra Plaintiff's Motion for Partial Summary Judgment;

- Defendants Crabbe, Brown & James and Larry James' (hereinafter collectively "Defendants Crabbe Brown") May 10, 2001 Memorandum Contra Plaintiff's Motion for Partial Summary Judgment;

- Plaintiff's May 22, 2001 Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment;

- Defendants UDF's April 24, 2001 Motion for Summary Judgment; Plaintiff's May 16, 2001 Memorandum Contra Defendants UDF's Motion for Summary Judgment;

- Defendants UDF's May 31, 2001 Reply in Support of Defendants UDF's Motion for Summary Judgment;

- Defendants UDF's September 22, 2003 Notice of Supplemental Case Law Regarding Issues Raised in Their Pending Motions for Summary Judgment; and

- Plaintiff's October 1, 2003 Memorandum in Reply to Defendants UDF's Notice of Supplemental Case Law.

For the reasons that follow, Plaintiff Reginald A. Cooke's Motion for Partial Summary Judgment is DENIED and Defendants United Dairy Farmers, Inc. and Brian P. Gillan's Motion for Summary Judgment is GRANTED.

BACKGROUND

Plaintiff is an attorney licensed to practice in Ohio. In February of 1996 Plaintiff was hired to represent Maude Williams and her son Michael Williams, both African-American former United Dairy Farmers, Inc. employees, allegedly terminated for racially discriminatory purposes.

Maude and Michael Williams, prior to Plaintiff's involvement in their case, had filed race discrimination complaints with the Ohio Civil Rights Commission (hereinafter "OCRC") claiming they had been fired from their jobs at United Dairy Farmers, Inc. (hereinafter "UDF") due to their race. One of the witnesses who testified before the OCRC was Patty Munyan, a Caucasian female and former UDF assistant manager, who worked at the same store as the Williamses and whose testimony substantiated the racial discrimination allegations. By the time Plaintiff began representing Maude and Michael Williams all of the testimony had already been submitted to the OCRC, including the testimony of Patty Munyan.

In August and October of 1996, Plaintiff filed civil actions on behalf of Maude and Michael Williams and against UDF. Patty Munyan was one of the witnesses Plaintiff intended to call at trial. In March of 1998, Warren Freeman, a boyfriend/acquaintance of Patty Munyan, contacted UDF's Chief Operating Officer and in-house counsel Brian Gillan, offering to sell him a videotape of Patty Munyan wherein she states that she was asked to testify falsely regarding the racial

discrimination allegations in exchange for a percentage of the settlement money the Williamses expected to receive from UDF. UDF purchased the videotape from Warren Freeman for $10,000.00 and subsequently discovered that Mr. Freeman had been convicted of approximately one dozen criminal offenses since the age of 18.

UDF then hired the public relations firm of Edward Howard & Co. (hereinafter "Edward Howard") and held a press conference at the Hyatt on Capital Square Hotel on June 4, 1998, "exposing" Patty Munyan's testimony and Plaintiff's involvement in the "scheme." Brian Gillan was the chief presenter at the press conference. Also present at the press conference was Larry James, an attorney with Crabbe Brown & James, who represented UDF in the racial discrimination litigation. No other employee of Crabbe Brown & James was present.

On June 3, 1999, Plaintiff filed this action alleging libel, slander, and conspiracy to defame based on the statements made at the June 4, 1998 press conference by Brian Gillan, thus also by United Dairy Farmers, Inc., and by Larry James, thus also by Crabbe Brown & James. In order to better understand the circumstances surrounding the parties' arguments with respect to the allegedly defamatory statements, a closer look is warranted at the videotape itself and the statements made at the press conference.

The Patty Munyan Videotape

According to Warren Freeman's affidavit, he recorded Patti Munyan without her knowledge by hiding a video camera behind dirty laundry in a laundry basket in Munyan's apartment. The tape is a full size VHS cassette and the recording is approximately 10 minutes in duration.

It appears the camera was level while the recording was made and the camera lens is not obscured by laundry or any part of the laundry basket. Although the volume is not muffled, it is difficult to make out some of the dialog, because the camera picks up Munyan and Freeman's voices as well as some background noises from the television. It is not clear who turned the camera on or off to record the conversation. A few seconds after the recording begins, Munyan assumes a position on a mattress where she is almost perfectly centered in the camera's field of view, and she remains centered for the duration of the tape.

The following exchange occurred on the tape:

Mr. Freeman: "What the hell happened anyway?"

Ms. Munyan: "They was saying that a supervisor - - some supervisors at work where I work on Frebis were discriminating. And they weren't really, you know. Maude Williams just caused a bunch of trouble. And she talked to me and asked me to go on the Civil Rights Commission and said whatever she gets she'll split. I said Okay. All I had to do is do what her and her lawyer said, and that's what I did."

Munyan continued: "Well, at the time that I did it I thought I was doing the right thing and I thought a little lie wouldn't hurt. I didn't know it was going to be all this. Because when I talked to Reggie and them about it they said, Oh, they'll settle quick."

She further explained: "I worked for them for eight years and then I get shit on. I didn't get nothing out of it, that's for damn sure. When she asked me to go up there to Civil Rights, she told me she'd pay me if she got anything out of it and I did it."

Munyan never states on the videotape that she agreed to testify falsely for Plaintiff and never states that she was to receive money that Plaintiff anticipated receiving from UDF. Rather, at the time Munyan made her statements to the Ohio Civil Rights Commission, a different attorney represented Maude and Michael Williams. Munyan was, however, to testify at the racial discrimination trial in which Plaintiff represented Maude and Michael Williams.

The June 4, 1998 Press Conference

At the June 4, 1998 press conference Brian Gillan delivered prepared remarks and following his presentation both Gillan and James responded to reporters' questions. The Patty Munyan videotape was played at the press conference, and copies of the tape along with a transcript of it were also distributed.

Press packets were also handed out to the reporters in attendance. The press packets contained statements that, among other things, Plaintiff knew that Maude and Michael Williams' legal claims were false, that he was part of a fraudulent scheme to force money from the company, and that Munyan agreed on the tape to testify falsely for Plaintiff.

The printed press packet materials distributed at the press conference stated that:

"Munyan admits on the tape that she agreed to testify falsely for Michael and Maude Williams and Cooke. In exchange for her testimony, Munyan was to receive a percentage of the money that Williams' mother and Cook anticipated receiving in an out-of-court settlement by UDF."

"It (the Munyan videotape) also spotlights the involvement of the plaintiffs' attorney, who fanned the flames with racial rhetoric to force the company to try to settle these bogus claims."

Defendant Gillan, during his prepared remarks, also stated that:

"... the Williamses' attorney - Mr. Cooke - was a key part of this scheme."

"... this fraud was cast in phony racial discrimination language because she, the plaintiff, and her attorney all thought that would be an easy way to force money from the company.., today their fraud has been unmasked."

On the morning of the press conference, James had a motion for sanctions filed in federal court in the *Williams v. UDF* case. The language in that motion for sanctions mirrored the language of the press packet, and contained statements that Plaintiff had committed "fraud on the court," the "grossest abuse of the judicial system," had promised "to pay a witness for false testimony," and had filed documents with the court with "knowledge that certain key allegations were false." At the press conference, the sole statement made by James was that he was not accusing Plaintiff of anything but that he had an obligation to report Plaintiff to the disciplinary counsel.[1]

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[1] Plaintiff's defamation claims against Defendants Crabbe Brown are based on this sole statement made by Larry James at the press conference.

Case History

On June 3, 1999, Plaintiff filed this defamation action against United Dairy Farmers, Inc., Brian Gillan, Larry James, and Crabbe, Brown & James, alleging slander, libel and conspiracy to defame.

Defendants Larry James and Crabbe, Brown & James filed a motion for summary judgment on April 24, 2001, and on June 18, 2002, the trial court found in their favor on all claims. The trial court found that James' statement that he had a duty to report Plaintiff to the disciplinary counsel was a statement of protected opinion, immune from a defamation claim. The trial court also found that there was insufficient evidence from which a jury could find that James conspired with UDF or Gillan to defame Plaintiff.

Upon Plaintiff's appeal of the trial court's decision, the Tenth District Court of Appeals agreed with the portion of the trial court's decision with respect to James' statement being an opinion but disagreed that there was insufficient evidence of conspiracy to defame. The Court of Appeals held that Edward Howard's billing entries indicated that there were discussions prior to the press conference between James and Edward Howard employees from which an inference could be raised that those discussions included at least a general discussion of the content of the press conference. The Court of Appeals also held that the language similarity between the press packets and the motion for sanctions, as well as James' participation at the press conference, implied a "common understanding or design" from which a jury could find conspiracy to defame.

Based on those findings the Court of Appeals sustained the trial court's grant of summary judgment on the issue of

protected "opinion" and reversed the portion of the trial court's decision that granted summary judgment on the claim of conspiracy to defame. The Court of Appeals further acknowledged that its determination does not indicate Plaintiff will ultimately prevail, but rather that the facts presented with respect to conspiracy to defame create a genuine issue of material fact for the jury to resolve.

On April 23, 2001, Plaintiff filed a Motion for Partial Summary Judgment, arguing that the statements made by Defendants constitute defamation per se because they tend to injure his trade or profession and as such he does not need to show actual damages or fault. On May 9, 2001, Defendants UDF and Defendants Crabbe Brown filed their respective Memoranda Contra Plaintiff's Motion for Partial Summary Judgment, arguing that the statements are not defamatory per se because they require resort to innuendo and interpretation and cannot be seen as defamatory on their face. Furthermore, Defendants argued, even if the statements are defamatory per se, since they involve a matter of public concern Plaintiff still needs to prove actual malice, and according to his own deposition testimony Plaintiff has no evidence of actual injury.

On April 24, 2001, Defendants UDF also filed a Motion for Summary Judgment, arguing that Plaintiff's claims must fail for several reasons. Defendants UDF argued that Plaintiff in this case, by repeatedly and voluntarily seeking out public attention for the racial discrimination case, is a limited purpose public figure who needs to prove actual malice in order to prevail. Defendants UDF also argued that the statements in question are protected opinion under the "totality of the circumstances" test and are also not actionable since they are based on fully disclosed facts. Defendants further argued that they had a qualified privilege to comment on a matter that, based on Plaintiff's own deposition

testimony, is of public concern. Finally, Defendants argued that without being able to establish the torts of slander and libel, Plaintiff also could not prevail on his claim of conspiracy to defame.

On May 16, 2001, Plaintiff filed a Memorandum Contra to both Defendants UDF's and Defendants Crabbe Brown's Motions for Summary Judgment, arguing that actual malice is only required in the case of a media defendant, that the protected "opinion" only applies in media cases, that Plaintiff is not a public figure, and that the qualified privilege does not apply because Defendants made the statements based on fabrication and not on available facts.

Both Plaintiff's April 23, 2001 Motion for Partial Summary Judgment, and Defendants UDF's April 24, 2001 Motion for Summary Judgment, are now pending before this Court.

LEGAL ANALYSIS

I. STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Ohio Rules of Civil Procedure governs the procedure for granting a motion for summary judgment. Before summary judgment may be granted, the court must first determine that 1.) there is no genuine issue as to any material fact that remains to be litigated; 2.) that the moving party is entitled to judgment as a matter of law; and 3.) that it appears from the evidence that reasonable minds can come to but one conclusion, and that conclusion, when viewing the evidence in a light most favorable to the party against whom the motion for summary judgment is made, is adverse to that same party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

Courts have cautioned, however, that "[s]ummary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion." *Norris v. Ohio Standard Oil Co.*, 70 Ohio St.2d 1, 2-3 (1982) (citing to *Morris v. First National Bank & Trust Co.*, 21 Ohio St.2d 25 (1970)).

In considering motions for summary judgment, courts also need to pay particular attention to the shifting burdens between the moving and non-moving parties. The moving party, seeking summary judgment on the ground that the non-moving party cannot prove its case, bears an initial burden of informing the court of the basis for its motion and "identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the non-moving party's claim." *Dresher v. Burr*, 75 Ohio St.3d 280, 293 (1996). If the moving party does not point to some evidence of the type listed in Civ.R. 56©, which demonstrates that the non-moving party has no evidence to support its claims, a motion for summary judgment must be denied. *Id.* However, once the moving party has met its initial burden, the burden then shifts to the non-moving party to bring to the court's attention facts showing a genuine issue for trial. *Id.* The non-moving party is also forced to produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.*, 59 Ohio St.3d 108, 111 (1991). (citing to *Celotex v. Catrett*, 477 U.S. 317, 322-323 (1986)). If this reciprocal burden is not met, summary judgment must be granted. *Dresher*, 75 Ohio St.3d at 293. However, in some instances, even if the non-moving party does not respond to

a summary judgment motion with evidentiary materials, the moving party may still not be entitled to judgment *as a matter of law. Little Forest Medical Center of Akron v. Ohio Civil Rights Commission*, 61 Ohio St.3d 607, 615-616 (1991). (emphasis added).

In determining whether there are genuine issues as to any material facts, courts must examine the applicable substantive law. *Miller v. Loral Defense Sys.*, 109 Ohio App.3d 379, 383 (1996). "A 'material fact' depends on the substantive law of the claim being litigated." *Hoyt, Inc. v. Gordon &Assoc., Inc.*, 104 Ohio App. 3d 598,603 (1995) (citing to *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986)). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Miller*, 109 Ohio App.3d at 383. (citing to *Anderson*, 477 U.S. at 248).

II. DEFAMATION PER SE

Defamation is a false publication causing injury to a person's reputation, exposing the person to public hatred, contempt, ridicule, shame, or disgrace, or affecting the person adversely in his or her trade or business. *Knowles v. Ohio State University*, Franklin App. No. 02AP-527, unreported, 2002 Ohio App. LEXIS 6779, at *8-9 (2002); *Matalka v. Lagemann*, 21 Ohio App.3d 134, 136 (1985). (citing to *Cleveland Leader Printing CO. v. Nethersole*, 84 Ohio St. 118, 134-135 (1911)). To establish the elements of a common-law action for defamation, a plaintiff must show that:

(1) the defendant made a false statement of fact about another;

(2) the statement was defamatory;

(3) there was an unprivileged publication of the statement to a third party;

(4) the plaintiff was injured as a result of the statement; and

(5) the defendant acted with the required degree of fault.

Sweitzer v. Outlet Communications, Inc., 133 Ohio App.3d 102, 108 (1999); *Lawson v. AKSteel Corp.*, 121 Ohio App.3d 251,256 (1997). Defamation consists of both slander, which refers to spoken defamatory words, and libel, which refers to written or printed defamatory words. *Mallory v. Ohio University*, Franklin App. No. 01AP-278, unreported, 2001 Ohio App. LEXIS 5720, at *8-9 (2001). (citing to *Lawson*, 121 Ohio App.3d at 256).

Defamation can also be characterized as either *per se* or *per quod*. *McCartney v. Oblates of St. Francis de Sales*, 80 Ohio App.3d345, 353 (1992). A statement is defamatory *per se* if it is such merely due to the words used, while a statement is defamatory *per quod* if it requires resort to interpretation or innuendo in order to reach its defamatory meaning as opposed to its innocent or harmless meaning. Id. Furthermore, for a statement to be considered defamatory *per se* it "must consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, imputes some loathsome or contagious disease which excludes one from society or tends to injure one in his trade or occupation." *Mallory*, 2001 Ohio App. LEXIS 5720 at *9. (citing to *McCartney*, 80 Ohio App.3d at 354). (emphasis added). Whether a statement is defamatory *per se*

or *per quod* is a question of law for the trial court to decide. *McCartney*, 80 Ohio App.3d at 354.

Plaintiff argues that the spoken and written statements by Defendants constitute defamation *per se* because they contain words that "tend to injure one in his trade or occupation." This Court agrees with that contention. Among the statements made by Defendants are the following:

"Munyan admits on the tape that she agreed to testify *falsely* for Michael and Maude Williams and Cooke. In exchange for her testimony, Munyan was to receive a percentage of the money that Williams' mother and Cook anticipated receiving in an out-of-court settlement by UDF."

"It (the Munyan videotape) also spotlights the involvement of the plaintiffs' attorney, who fanned the flames with racial rhetoric to force the company to try to settle these bogus claims."

"... the Williamses' attorney- Mr. Cooke - was a key part of this scheme."

"... this fraud was cast in phony racial discrimination language because she, the plaintiff, and her attorney all thought that would be an easy way to force money from the company.., today their fraud has been unmasked."

Clearly, the words used need no reference to innuendo or interpretation to be understood as accusing Plaintiff of having asked a witness to testify falsely. The words used are not susceptible to an innocent interpretation that would require resort to innuendo to reach their defamatory meaning but convey their defamatory meaning on their own. Furthermore, a statement that an attorney has asked a witness to testify

falsely in order for the attorney's clients to prevail is extremely injurious to that attorney's trade and profession. Attorneys, as officers of the court, are to promote the interests of justice and to remain truthful and honest to the court, to their clients, and to other attorneys. A statement that an attorney has so asked a witness to falsely testify strikes at the very heart of that attorney's professional integrity. Therefore, Plaintiff correctly states that the statements at issue constitute defamation *per se*.

In the case of a statement found to be defamatory *per se*, as opposed to defamatory *per quod*, Plaintiff also correctly argues that damages and actual malice are presumed. *Becker v. Toumlin*, 165 Ohio St. 549, 556 (1956); *Temethy v. Huntington Bancshares, Inc.*, Cuyahoga App. No. 83291, unreported, 2004 Ohio App. LEXIS 1111, at *9 (2004). However, even where a plaintiff can establish a statement is defamatory per se, the plaintiff still may not be able to prevail if the statement is protected by a qualified privilege. *Temethy*, 2001 Ohio App. LEXIS 1111 at *9.

III. QUALIFIED PRIVILEGE

A qualified, or conditional, privilege is a defense based on public policy, where "the interest that the defendant is seeking to vindicate is conditioned upon publication in a reasonable manner and for a proper purpose." *Hahn v. Kotten*, 43 Ohio St.2d 237, 243 (1975). Although the qualified privilege "does not change the actionable quality of the words published, [it] ... rebuts the inference of malice that is imputed in the absence of privilege, and makes a showing of falsity and actual malice essential to the right of recovery." *Id.* at 244.

A publication is privileged "when it is 'fairly made by a person in the discharge of some public or private duty,

whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.'" *Id.* (quoting Prosser's Law of Torts (4 Ed.) 786, Section 115). It arises when there is a moral or legal obligation to speak in order to protect or further an interest common to the publisher and the recipient. *Hahn*, 43 Ohio St.2d at 244. It arises from "the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits." *Id.* at 245-246. In other words, a publication is conditionally privileged where" ... the person is so situated that it becomes right in the interest of society that he should tell third persons certain facts, which he in good faith proceeds to do." *Id.* at 245-246.

However, to be privileged the communication needs to be made in good faith, made in reference to an interest to be upheld, the statement needs to be limited in scope to this purpose, and be made at a proper occasion, in a proper manner and to proper parties only. *Id.* (citing to 50 American Jurisprudence 2d 698, Libel and Slander, Section 195). The determination of whether this qualified privilege applies to a given communication, when the content and circumstances of the occasion for the alleged defamatory communication are not in dispute, is a question of law for the trial court. *McCartney*, 80 Ohio App.3d at 355.

Defendants UDF in this case argue that the statements in question concern a matter that is of public concern and as such are protected by this qualified privilege. This Court agrees that a qualified privilege does apply to the statements in question.

Allegations of racial discrimination are of great public concern. A review of the record indicates that there was great public attention and interest in the racial discrimination

actions filed by Maude and Michael Williams against UDF.[2] Plaintiff himself has attested to the same in his deposition testimony, indicating that with respect to the suits filed by Maude and Michael Williams:

> ... the decision was to at least make the lawsuit public, that we're filing a lawsuit and we'll proceed with that. And that the public is at least aware of that, in particular African-American communities, where at least an allegation is out there that there are derogatory comments being made about black customers as they are going in the store .... so there was a sense of responsibility along those lines, not simply just to prosecute the case, but to possibly at least alert others .... And in this situation with UDF ... was information, information that the public needed to know... So it was really a sense of responsibility to at least let the public know.

(*Cooke Depo.* p.59-63). Therefore, since the public was already aware of these allegations of racial discrimination, a common interest existed between Defendants UDF and the public with regards to the veracity of the allegations. The statements made by Defendants at the June 4, 1998 press conference were about those same allegations. The statements were limited in scope to the purpose of informing the public of this new evidence that had surfaced indicating that Patti Munyan had been asked to falsely testify about the existence of racial discrimination at UDF. The statements were made at

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[2] Numerous newspaper articles were written about the racial discrimination allegations against UDF. Also, the NAACP and the Reverend Jesse Jackson initiated a boycott of UDF following the racial discrimination allegations.

a press conference, designed to inform the public, and were made to the public. With respect to the manner of publication, Defendants did not merely make the allegedly defamatory statements but also showed the actual videotape of Patti Munyan, provided copies of the videotape to the media outlets present, and provided transcripts of the videotaped conversation between Patti Munyan and Warren Freeman.

There is also no evidence to indicate that the publication was not made in good faith. The relationship of the parties to the communication was "such as to afford a reasonable ground for supposing an innocent motive for giving information and to deprive the act of an appearance of officious intermeddling in the affairs of others." *Hahn*, 43 Ohio St.2d at 246. Plaintiff argues that there were 20 other witnesses whose testimony corroborated the allegations of racial discrimination. Plaintiff also points out that Defendants purchased the videotape from a "career criminal." Regardless, that evidence does not defeat the existence of a moral, and even legal, obligation on the part of Defendants, in light of their common interest, to share the videotape with the public. There was a moral obligation to inform the public of this newly discovered evidence indicating that the allegations of racial discrimination might be unfounded. There was also a legal and ethical obligation to disclose evidence of potential attorney misconduct in asking a witness to falsely testify in court. Therefore, the statements made by Defendants, although defamatory *per se* in light of the foregoing discussion, nonetheless properly fall within the purview of the qualified privilege.

IV. MALICE AND ACTUAL DAMAGES

To defeat a qualified privilege and recover presumed damages, a plaintiff must, via clear and convincing evidence,

show that the statement was made with actual malice. *Jacobs v. Frank*, 60 Ohio St.3d 111, paragraph two of the syllabus (1991). Actual malice, in the context of a qualified privilege, is defined as "acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Id.*[3] However, reckless conduct, in the sense of reckless disregard, "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Rather, there must exist "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

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[3] The Supreme Court of Ohio in *Jacobs* acknowledged that there had been come confusion in a number of decisions as to the proper definition of "malice" in the context of a qualified privilege. Numerous decisions had interchangeably used the public official defamation standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which defined actual malice as publication made with knowledge that it was false or with reckless disregard for its truth or falsity, with the common-law actual malice standard which connotes "... (1) ... hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St. 3d 334 (1987). (emphasis added). The high Court in Jacobs put the issue to rest by holding that:

> when a defendant possesses a qualified privilege regarding statements contained in a published communication, that privilege can be defeated only by a clear and convincing showing that the communication was made with actual malice. In a qualified privilege case, "actual malice" is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity.

Jacobs, 60 Ohio St.3d at 116.

Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Id.*

Plaintiff argues that the statements were made with such actual malice. Plaintiff points out that Defendants obtained the tape from a man who was a "career criminal," and that on July 30, 1998 Freeman and Munyan robbed a Dairy Mart store together, implying that they are "partners in crime." Plaintiff also points to the affidavits of Sharon Tigner and Eugene Walker, attesting that Munyan actively collaborated with Freeman in the making of the Patti Munyan videotape.[4] Finally, Plaintiff argues that Patti Munyan herself has stated that she was drunk and lied when making those statements on the videotape in order to impress Freeman.[5]

In determining whether a defendant made a statement while aware of a high probability of the statement's falsity, courts not only look at the truth or falsity of the statement itself but also at the subjective belief of the publisher. *Jacobs*, 60 Ohio St.3d at 119. (citing to *Varanese v. Gall*, 35 Ohio St.3d 78, 82-83 (1988)). Furthermore, actual malice is to be measured at the time of publication. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 124 (1980). (citing to *Glover v. Herald Co.*, 549 S.W.2d 858, 861 (Mo. 1977)). Therefore, what transpired *after the press conference* cannot be viewed as an indicator of Defendants' subjective beliefs *at the time of*

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[4] These affidavits surfaced in the fall of 1998, after Maude and Michael Williams' trial, which resulted in a verdicts for UDF. On the basis of these two affidavits Maude and Michael Williams moved for a new trial.

[5] Munyan made these statements at a press conference held by Plaintiff after UDF's June 4, 1998 press conference.

the press conference with respect to the truthfulness of Munyan's statements.

Plaintiff also argues that actual malice can be found by way of Defendants' conduct at the press conference, arguing that Defendants' conduct "did not consist of merely orchestrating the publication of that tape, but instead consisted of fabricating and uttering false factual allegations which are wholly unsubstantiated by that tape." (*Plaintiff's Memorandum Contra Defendants' Motion for Summary Judgment* at 25). Although Munyan never stated that Plaintiff asked her to testify falsely, Defendants argue that that was their overall impression based of Munyan's statements. Defendants argue that Brian Gillan believed Warren Freeman and relied on his sworn affidavit that Patti Munyan was videotaped without her knowledge. Gillan also believed that based on the videotape Plaintiff "was aware of, responsible for, and involved in presenting false testimony by Munyan in the pending discrimination cases." (*Gillan Depo.* p.93-94). In addition, Wayne Hill, the Edward Howard employee who also viewed the videotape before the press conference, found the videotape believable and stated, "no one, including me, had any reason to believe anything other than it was believable." (*Hill Depo.* p.6768, 74).[6]

Following the press conference evidence surfaced that Patti Munyan was allegedly either drunk at the time of the recording, and made those statements in order to impress

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[6] Other Edward Howard employees, including John Kompa, Suzanne Helmick, and Dawn Pribble, also testified that they thought the statements made by Patti Munyan on the infamous videotape were true. (*Kompa Depo.* p.47-48; *Helmick Depo.* p. 13-15; *Pribble Depo.* p. 15).

Warren Freeman, or that Patti Munyan and Warren Freeman conspired and fabricated the statements in order to get money out of UDF.[7] Regardless, there is no evidence that Defendants entertained any serious doubts as to the truthfulness of Patti Munyan's videotaped statements *at the time of the publication*. Because the communication must be viewed on the *subjective* belief of the publishers, what matters in this case is that Defendants relied on a sworn affidavit that Patti Munyan was videotaped *without* her knowledge, and consequently did not have any reason to doubt the veracity of her statements. In essence, Munyan's statements on the videotape were contrary to her interests since they could potentially expose her to charges of perjury. When someone makes such a statement, that statement has been memorialized on videotape, and it is believed that the person does not know that his/her statement is being recorded, it is not unreasonable for one to believe that the statement is accurate since no one would purposefully state something that could cause him/her trouble.

Since Plaintiff cannot prove actual malice with clear and convincing evidence, he therefore cannot rely on presumed damages and must establish actual damages. However, based on Plaintiff's own deposition testimony, Plaintiff has no evidence of actual injury. (*Cooke Depo.* p. 184-186). Although impairment of reputation and standing in the community, as well as personal humiliation and mental anguish, qualify as "actual injury," a damages award must be supported by "competent evidence concerning the injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,349-350 (1974).

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[7] Plaintiff himself has indicated that he is not certain whether Patti Munyan was in fact drunk at the time of the recording. (*Cooke Depo.* p.22-24, 31-32, 37, 41-42).

Plaintiff, with respect to such actual injury, has stated that he "cannot prove it." (*Cooke Depo.* p. 184-186). Therefore, being unable to establish actual damages, and having failed to establish actual malice, Plaintiff cannot as a matter of law prevail on his claims of slander and libel.

V. CONSPIRACY

Civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. TransAmerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419 (1995). Although a plaintiff does not need to show an express agreement in order to demonstrate a malicious combination to injure, the plaintiff nonetheless must bring forth evidence of "a common understanding or design * * * to commit an unlawful act." *Gosden v. Louis*, 116 Ohio App.3d 195, 219 (1996). The Supreme Court of Ohio has recognized that "[w]here a slander is uttered by one or more persons, pursuant to a conspiracy which includes among its purposes the defamation of another, all parties to the conspiracy are jointly liable and may be joined as parties defendant in the same action." *Schoedler v. Motometer Gauge & Equipment Corp.*, 134 Ohio St. 78, paragraph one of the syllabus (1938).

However, a claim of civil conspiracy is derivative in nature; its existence is predicated on the existence of the underlying tort itself. Burns v. Rice, Franklin App. No.03AP-717, unreported, 2004 Ohio App. LEXIS 2903, at *36-37 (2004). (citing to Kenty v. Transamerica Premier Ins. Co., Franklin App. No.93AP-478, unreported, 1993 Ohio App. LEXIS 5596, at *20 (1993)). Therefore, without the existence of the underlying unlawful act of defamation on the part of Defendants, there could be no claim for civil conspiracy to

defame against Defendants. *Id.* Furthermore, since the statements at issue are not actionable under this line of reasoning, and since the claims fail accordingly, there is no reason for this Court to consider any of the other arguments raised by the parties with respect to these same claims.

CONCLUSION

Accordingly, Plaintiff Reginald A. Cooke's April 23,2001 Motion for Partial Summary Judgment is hereby DENIED and Defendants United Dairy Farmers, Inc. and Brian P. Gillan's April 24, 2001 Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED.

/s/ _____
John P. Bessey, Judge

Copies to:

James C. Lee, Esq.
John A. Yaklevich, Esq.
Jerry S. Sallee, Esq.
Counsel for Plaintiffs

Gail C. Ford, Esq.
Joseph R. Miller, Esq.
Counsel for Defendants, Larry H. James and
Crabbe, Brown & James

Court of Common Pleas
Franklin County, Ohio
Civil Division

No. 99CVC06-4512

[Filed August 12, 2004]

Reginald A. Cooke	)
Plaintiff,	)
	)
v.	)
	)
United Dairy Farmers, Inc.,	)
Defendants.	)
	)

ENTRY JOURNALIZING DETERMINATION OF NO JUST CAUSE FOR DELAY

Pursuant to the provisions of Ohio Rul. Civ. P. 54(B), this Court, having rendered its Decision and Entry on July 30, 2004 denying plaintiff Reginald Cooke's motion for partial summary judgment filed April 23, 2001 and granting defendants United Dairy Farmers, Inc.'s and Brian Gillan's motion for summary judgment filed April 24, 2001, expressly finds that there is **no just reason for delay** for the entry of final judgment as to the claims and defenses set forth in plaintiffs motion for partial summary judgment and defendants United Dairy Farmers' and Brian Gillan's motion for summary judgment herein.

Entered this 12th day of August, 2004.

/s/ _____
John. P. Bessey, Judge

Approved:

/s/ _____
John. A Yaklevich, Esq.
W. Moore & Yaklevich
326 South High Street, Suite 300
Columbus, Ohio 43215
Direct: 614-241-2156
Fax: 614-241-5909
Counsel For Plaintiff Cooke

/s/ _____
Jerry S. Sallee, Esq.
Louise S. Brock, Esq.
Dinsmore & Shohl LLP
1900 Chemed Center
255 East Fifth Street Cincinnati,
Ohio 45202
Direct: 513-977-8378 Fax: 513-977-8141
Counsel for Defendants United Dairy Farmers, Inc.
and Brian Gillan

/s/ _____
Gail C. Ford, Esq.
Vorys, Sater, Seymour and Pease
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Direct: 614-464-6394
Fax: 614-464-6350

Counsel for Defendants
Crabbe, Brown, Jones, Potts
& Schmidt and Larry H. James

APPENDIX D

Court of Appeals of Ohio
Tenth Appellate District

No. 02AP-781

[Filed June 17, 2003]

Reginald A. Cooke	)
Plaintiff-Appellant,	)
	)
v.	)
	)
United Dairy Farmers, Inc.,	)
Defendants-Appellees.	)
	)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on June 17, 2003, having sustained plaintiff's first assignment of error in part and overruled in part, and having overruled plaintiff's second assignment of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to the court for further proceedings in accordance with law consistent with said opinion. Costs to defendants.

/s/ _____
Judge Donna Bowman

/s/ _____
Judge Peggy Bryant

Court of Appeals of Ohio
Tenth Appellate District

No. 02AP-781

[Filed June 17, 2003]

Reginald A. Cooke	)
Plaintiff-Appellant,	)
	)
v.	)
	)
United Dairy Farmers, Inc.,	)
Defendants-Appellees.	)
	)

OPINION

BOWMAN and BRYANT, JJ., concur. LAZARUS, J., dissents.

PER CURIUM.

Plaintiff-appellant, Reginald A. Cooke, appeals from the June 18, 2002 judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Larry James ("James") and Crabbe, Brown, Jones, Potts & Schmidt ("Crabbe, Brown") on Cooke's defamation and civil conspiracy claims. Because genuine issues of material fact exist, we reverse.

Cooke is an attorney-at-law engaged in private practice who maintains an office in Columbus, Ohio. In February 1996, Cooke was hired to represent Maude Williams and her son Michael Williams, both of whom are former employees of defendant United Dairy Farmers, Inc. ("UDF"). The Williamses are African-American and, in 1995, they filed race discrimination complaints with the Ohio Civil Rights Commission ("OCRC") claiming that they had been fired from their jobs at UDF due to their race. Prior to Cooke's involvement in the proceedings, attorney Daniel Klos represented the Williamses. At the time Cooke first met the Williamses and became involved in their cases, all testimony had been submitted to the OCRC, including the testimony of a former UDF assistant manager, Patty Munyan.

In August and October 1996, Cooke filed civil actions in federal court on behalf of the Williamses and against UDF. One of the witnesses Cooke intended to call at trial to substantiate allegations of racially biased attitudes and actions of UDF supervisory personnel was Patty Munyan, who had worked at the same store as the Williamses.

In 1997 or 1998, Munyan became involved with Warren Freeman, who at the time had been convicted of approximately one dozen criminal offenses since the age of 18. In March 1998, Freeman offered to sell to UDF a videotape of Munyan, which Freeman claimed to have surreptitiously recorded. The tape is approximately 10 minutes long, and according to Freeman's affidavit, Freeman recorded the tape without Munyan's knowledge by hiding a video camera under dirty laundry in a laundry basket in the bedroom of the apartment where Freeman and Munyan were staying. The tape is a full size VHS cassette,

and if, as UDF indicated, that tape was the original, Cooke contends that a full size VHS camera necessarily recorded it. Upon viewing the tape, it appears the camera was level while the recording was made, the camera lens is not obscured by laundry or any part of the laundry basket, and the volume is not muffled. However, it is difficult to make out some of the dialog, because the camera was apparently near a television that was playing, and the tape picks up both the sound from the television and Munyan and Freeman's voices. It is not clear who turned the camera on or off to record the conversation, but a few seconds after the tape begins, Munyan assumes a position on a mattress where she is almost perfectly centered in the camera's field of view, and she remains centered for the duration of the tape.

The following exchange occurred on the tape:

"Mr. Freeman: What the hell happened anyway?

"Ms. Munyan: They was saying that a supervisor - - some supervisors at work where I work on Frebis were discriminating. And they weren't really, you know. Maudie Williams just caused a bunch of trouble. And she talked to me and asked me to go on the Civil Rights Commission and said whatever she gets she'll split. I said Okay. All I had to do is do what her and her lawyer said, and that's what I did."

Munyan continued: "Well, at the time that I did it I thought I was doing the right thing and I thought a little lie wouldn't hurt. I didn't know it was going to be all this. Because when I talked to Reggie and them about it they said, Oh, they'll settle quick."

She further explained:

"I worked for them for eight years and then I get shit on. I didn't get nothing out of it, that's for damn sure. When she asked me to go up there to Civil Rights, she told me she'd pay me if she got anything out of it and I did it."

Munyan never states on the videotape that she agreed to testify falsely for Cooke and never states that she was to receive money that Cooke anticipated receiving from UDF. Rather, at the time Munyan made her statements to the Ohio Civil Rights Commission, a different attorney represented the Williamses.-

UDF purchased the videotape from Freeman for $ 10,000, and working with the public relations firm of Edward Howard & Co. ("Edward Howard"), held a press conference at the Hyatt on Capital Square Hotel on June 4, 1998. According to Edward Howard's billing records, James had several communications with Edward Howard, including a "news conference phone discussion" with Wayne Hill on June 3, 1998, the day before the press conference.

Defendant, Brian Gillan, Chief Operating Officer and general counsel for UDF, was the chief presenter at the press conference. James, trial counsel for UDF in the race discrimination litigation, sat together with Gillan at the presenters' table. No other employee of Crabbe, Brown was present. During the press conference, Gillan delivered prepared remarks to the reporters, and following the prepared remarks, both Gillan and James responded to reporters' questions. The Freeman/Munyan videotape was played at the press conference, copies of the tape were

distributed, a transcript of the tape was distributed, and reporters who attended were given press packets stating, among other things, that Cooke knew that the Williams' legal claims were false, that he was part of a fraudulent scheme to force money from the company, and that Munyan agreed on the tape to testify falsely for Cooke. The printed press packet materials distributed at the press conference stated that:

"Munyan admits on the tape that she agreed to testify falsely for Michael and Maudie Williams and Cooke. In exchange for her testimony, Munyan was to receive a percentage of the money that Williams' mother and Cook anticipated receiving in an out-of-court settlement by UDF."

On the morning of the press conference, James had a motion for sanctions filed in federal court in the *Williams v. UDF* case. In his motion, James discussed the Munyan videotape and accused Cooke of "fraud on the court," the "grossest abuse of the judicial system," a "promise to pay a witness for false testimony," and of filing documents with the court with "knowledge that certain key allegations were false." However, during the press conference itself, James indicated that he was not accusing Cooke of anything. James did state, however, that he had an obligation to report Cooke to the disciplinary counsel.

During discovery, James indicated that he played no part in developing the oral presentation Gillan made or the written materials UDF distributed at the press conference. James stated that he intended to attend the press conference as part of the audience, but Gillan asked him to join him at the front of the room. James stated that he did not know in

advance of the press conference what Gillan intended to say, and that he only learned of the statements when he first heard them at the event on June 4, 1998.

On June 3, 1999, Cooke filed a complaint for libel, slander, and conspiracy against UDF, Brian Gillan, Larry James, and Crabbe, Brown. After discovery, the defendants filed motions for summary judgment, and Cooke filed a motion for partial summary judgment.

On June 18, 2002, the trial court found in favor of James and Crabbe, Brown on all claims. The trial court found that James' comment about a disciplinary referral was a statement of opinion and therefore protected by, and immune from a defamation claim. The trial court further found no evidence from which a jury might conclude James conspired with UDF or Gillan to defame Cooke or from which James or Crabbe, Brown could be held liable for the statements published by UDF and Gillan.

This appeal followed, with Cooke assigning as error the following:

"1. The trial court erred in sustaining defendants-appellees' motion for summary judgment.

"2. The trial court erred in ordering that portions of the record of this action be sealed from public disclosure."

In his first assignment of error, Cooke argues that a genuine issue of material facts exists concerning James' level of involvement in the planning and execution of the June 4, 1998 press conference. Cooke contends that the trial court improperly weighed James' denial of any

involvement with Cooke's circumstantial evidence of his involvement in the press conference, and erroneously concluded that James did not cause or participate in the publication of the defamatory material.

Defamation, which includes both libel and slander, is a false publication causing injury to a person's reputation, exposing the person to public hatred, contempt, ridicule, shame, or disgrace, or affecting the person adversely in his or her trade or business. *Knowles v. Ohio State Univ.*, Franklin App. No. 02AP-527, 2002 Ohio 6962; *Sweitzer v. Outlet Communications, Inc.* (1999), 133 Ohio App.3d 102, 108, 726 N.E.2d 1084, citing *Matalka v. Lagemann* (1985), 21 Ohio App.3d 134, 136, 21 Ohio B. 143, 486 N.E.2d 1220. Slander refers to spoken defamatory words, while libel refers to written or printed defamatory words. *Mallory v. Ohio Univ.*, Franklin App. No. 01AP-278, 2001 Ohio 8762, *citing Lawson v. AK Steel Corp.* (1997), 121 Ohio App.3d 251, 256, 699 N.E.2d 951. To establish defamation, a plaintiff must show: (1) the defendant made a false statement, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff was injured as a result of the statement, and (5) the defendant acted with the required degree of fault. *Sweitzer,* supra.

Any act by which defamatory matter is communicated to a third party constitutes publication. *Hecht v. Levin* (1993), 66 Ohio St.3d 458, 460, 1993 Ohio 110, 613 N.E.2d 585, citing 3 Restatement of the Law 2d, Torts (1965), Section 577(1) at Comment *a*. "As a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication * * *. Hence, one who requests, procures, or aids or abets, another to publish defamatory matter is liable as well as the

publisher." *Scott v. Hull* (1970), 22 Ohio App.2d 141, 144, 259 N.E.2d 160, quoting 53 Corpus Juris Secundum 231, Libel and Slander, Section 148. Thus, liability to respond in damages for the publication of defamation must be predicated on a positive act. *Scott v. Hull,* supra. Nonfeasance, on the other hand, is not a predicate for liability. Id. Mere knowledge of the acts of another is insufficient to support liability. *Kerlin v. Zahn* (C.A.6, 1985), 782 F.2d 1042.

Under Ohio law, civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. TransAmerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 419, 1995 Ohio 61, 650 N.E.2d 863. While a plaintiff need not show an express agreement in order to demonstrate a malicious combination to injure, he must put forth evidence of "a common understanding or design * * * to commit an unlawful act." *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 219, 687 N.E.2d 481.

Ohio recognizes the tort of conspiracy to commit defamation, as the Ohio Supreme Court has held that "where a slander is uttered by one or more persons, pursuant to a conspiracy which includes among its purposes the defamation of another, all parties to the conspiracy are jointly liable and may be joined as parties defendant in the same action." *Schoedler v. Motometer Gauge & Equipment Corp.* (1938), 134 Ohio St. 78, 15 N.E.2d 958, paragraph one of the syllabus.

As to Cooke's contention that summary judgment was improperly granted, Civ.R. 56(c) states that summary

judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46. "The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292, 1996 Ohio 107, 662 N.E.2d 264. Once the moving party meets its initial burden, the nonmovant must then produce competent evidence showing that there is a genuine issue for trial. Id. Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 1992 Ohio 95, 604 N.E.2d 138.

Appellate review of summary judgments is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d

579, 588, 641 N.E.2d 265; *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411. We stand in the shoes of the trial court and conduct an independent review of the record.

Here, Cooke argues that apart from any of James' own allegedly defamatory statements, James is also liable for all the defamatory statements that were published during the press conference by Gillan and UDF because James helped organize the press conference, distributed the written materials to reporters, spoke to the media, and made copies of the Munyan videotape available to the media. In addition, in a separate count of his complaint, Cooke alleged that all of the defendants conspired or agreed and planned to defame him and, as a result, each should be held liable for the tortious acts of the others.

Three factors here convince us that questions of fact preclude summary judgment on Cooke's defamation claim against James. Initially, the evidence, with all inferences drawn in favor of Cooke, suggests James was involved in planning the contents of the press conference. The May 11 and 14, 1998 billing entries from Edward Howard indicate that a tape was picked up and then returned to James. The May 18, 1998 entry reflects a meeting with James and Gillan, as well as others, to discuss "next steps." On May 21, 1998, entries state, "news conference prep/review Cheadle filing/discuss w/ L. James," and "review Larry James' Cheadle-filing [sic] and offer message points to WRH." Colleen Cheadle was James' client and a former UDF manager, and it is undisputed that James answered questions about Cheadle at the press conference. The June 3, 1998 entry notes, "complete work on press conference plans and materials; discussions w/ J. Kompa, B. Gillan, L.

James," and an invoice for that date states "news conference phone discussions with B. Gillan and L. James."

Billing records for the time period after the press conference indicate James was involved in post-press conference strategy. For example, the entry for June 5, 1998 indicates, "follow-up to news conference--monitor news casts, arrangements for interview programs, reporter contacts, discussions w/ L. James, B. Gillan." Similarly, the June 8, 1998 entry states, "continuing follow-up to news conference and related activities--strategy discussions w/ B. Gillan, L. James," and the June 9, 1998 entry notes, "draft response re: Cooke news release of 'bogus' tape; plan activities with B. Gillan, L. James." Entries on June 11, 13, and 14 all reflect arrangements involving James, including a tape pick-up from James and draft of "dirs./room info for Brian and Larry James."

While the foregoing entries do not compel a jury to conclude James was involved in planning the press conference, they allow such an inference. James was present in the meetings as legal counsel. From that a jury properly could conclude that the entries reflecting discussion of the upcoming press conference would include at least a general discussion of the content to be presented, because James' presence suggests a discussion concerning the legal aspects of the press conference and its content.

Secondly, James' participation in the press conference itself implies a common understanding or design. Whether or not James knew in advance that he would be involved in the conference, he participated in it after having participated in the pre-conference discussions noted above.

His single repudiation of the general thrust of the conference, through his statement that he was not accusing Cooke of anything, is a factor the jury may consider in determining the degree to which James had a common understanding of the plan for the press conference.

Lastly, the document James filed in federal court the morning before the press conference contained virtually the same allegations against Cooke that arose out of the press conference. The motion for sanctions states in pertinent part that "Munyan admits on the tape that she agreed to testify falsely for Plaintiff and Cooke in exchange for sharing the money Plaintiff and Cooke believed they would receive from Defendants." As noted, the press conference materials stated in pertinent part that "Munyan admits on the tape that she agreed to testify falsely for Michael and Maudie Williams and Cooke. In exchange for her testimony, Munyan was to receive a percentage of the money that Williams' mother and Cooke anticipated receiving in an out-of-court settlement by UDF." Cooke argues the similarity of language is even more remarkable in view of the fact that Munyan never actually made such an admission on the Munyan videotape.

Cooke's argument is persuasive. Without question, James is protected from a defamation claim for the contents of the documents filed in the court proceedings, and Cooke does not seek to hold James liable for the contents of the court document. Moreover, the similarity between the court document and the press conference content is not enough in itself to allow an inference of a common understanding sufficient to prevent summary judgment for James. Nonetheless, James' participation in pre-conference discussions, combined with his filing the court document

and his presence at the press conference, suggests James was aware of the substance of the press conference, agreed to the common understanding, filed a document in court reflecting the common understanding, and participated in the conference with that understanding.

We readily acknowledge that our determination of Cooke's assignment of error does not indicate Cooke ultimately will prevail. Rather, we determine only that the facts the parties presented create a genuine issue of material fact for the jury to resolve.

Cooke next argues that James' own statement at the press conference that he had an obligation to report Cooke to the disciplinary counsel was not a protected statement of opinion, and therefore summary judgment was unwarranted.

The Ohio Supreme Court has determined that the Ohio Constitution supplies a separate and independent protection for opinions, and is not limited in its application to allegedly defamatory statements made by media defendants. *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 2001 Ohio 1293, 752 N.E.2d 962, syllabus. Thus, nonmedia defendants, such as James, may invoke this protection for opinions. Id. at 112. The determination of whether allegedly defamatory language is opinion or fact is a question of law to be decided by the court. *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280, 1995 Ohio 187, 649 N.E.2d 182, citing *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 250, 25 Ohio B. 302, 496 N.E.2d 699.

"When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared." *Vail,* paragraph one of the syllabus.

Applying this test, we note that James spoke in terms of an "obligation" to turn the matter over to the disciplinary counsel. In many situations, whether an individual has a legal or ethical obligation is verifiable in the sense that certain legal or ethical standards exist, but whether a particular individual believes that he has such an obligation under a given set of circumstances is much less verifiable. The general context of the statement was a response to a reporter's question concerning the conduct of Cooke. Before making the "obligation" comment, James first responded, "I'm not going to get into that. He's been practicing law for a long time." The broader context of the statement was the press conference in which UDF was defending itself in the media against claims of racial discrimination, and accusing Cooke of orchestrating a campaign based on fabrications. Under the totality of the circumstances, we conclude that the language James used was value laden and represented a subjective viewpoint.

We note that in Cooke's own deposition, he characterized James' statement in the following way: "I am aware that he lent his credibility and standing to this event, and I am aware that he offered in his professional capacity the statement that in his professional opinion he was required to report me to the Bar." (*Cooke Depo.*, at 193.) Thus, James' statement would be understood by the

ordinary listener as the professional opinion of an attorney that he had a legal obligation to report Cooke to the disciplinary counsel. Ultimately, whether Cooke had or had not committed an ethical violation was not for James to decide, and at the press conference, James never offered his opinion or accused Cooke of an ethical violation. While the "disciplinary" statement was constitutionally protected, for the reasons noted the trial court nonetheless erred in granting summary judgment in favor of James.

In his second assignment of error, Cooke contends the trial court erred in ordering certain documents sealed. Cooke contends that the agreed confidentiality order only prohibited him from using certain documents outside the proceeding and made no provision for the sealing of any documents. Thus, he contends the order sealing the documents was erroneous.

The terms of the confidentiality order, in pertinent part, were as follows:

"During the course of discovery in this matter, Cooke requested Edward Howard & Company ('EH & C') to produce certain documents that were a result of communications between it and defendant United Dairy Farmers, Inc. ('UDF')[.] * * * The parties herein agree that the parties and/or their counsel herein shall hereby be precluded from using, showing, disclosing, disseminating, or otherwise revealing the contents of any such documents outside of the proceedings herein."

Defendants UDF and Gillan filed the motion to have the documents placed under seal, they are not parties to this appeal, and their case remains pending before the trial

court. Defendants James and Crabbe, Brown were not parties to the motion to seal, and they are the only parties opposing this appeal. Accordingly, the second assignment of error is not properly before this court at this time, and any decision by this court at this time without giving UDF and Gillan an opportunity to be heard would be prejudicial to their interests. The second assignment of error is, therefore, overruled.

Based on the foregoing, Cooke's first assignment of error is sustained in part and overruled in part, his second assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is reversed.

Judgment reversed.

BOWMAN and BRYANT, JJ., concur.

LAZARUS, J., dissents.

DISSENT: LAZARUS, J., dissenting.

Being unable to agree with the majority's disposition of Cooke's first assignment of error, I respectfully dissent.

In looking at the evidence Cooke submitted in support of his claims, there is no evidence that James helped organize the press conference, nor did he distribute written materials or the videotape to the media. According to his deposition testimony, James had a general idea as to what the press conference was going to be about, but as discussed above, mere knowledge of the acts of another is insufficient to support liability for defamation. The majority finds that James was an active participant in the press

conference during which the defamatory comments were made and written materials distributed. However, James chose his own words carefully at the press conference, even stating at one point, "I am not accusing Reggie of anything." In sum, what James said, and more importantly the lack of evidence concerning any involvement in planning the press conference, do not constitute the kind of positive act necessary for one to be liable for defamation. I disagree that mere participation in a press conference where someone else makes defamatory statements is sufficient to constitute participation in the publication of defamatory material.

With respect to the motion for sanctions, communications between James and UDF are shielded by attorney-client privilege, and it is impossible to know whether UDF modeled its press materials after the motion for sanctions, whether James or other attorneys for UDF modeled the motion for sanctions after the press release materials, or even whether James was aware of the press release materials when he signed the certificate of service on the motion for sanctions. While we must view the evidence in a summary judgment motion most strongly in favor of the nonmoving party, such a view does not extend to rank speculation.

Finally with respect to the billing records, some of the billing entries appear innocuous at best. In addition, the records concerning meetings after the press conference are irrelevant to establishing that James participated in the planning of the event. Construing all of this evidence most strongly in favor of Cooke, I find the most that can reasonably be inferred is that James had discussions with Edward Howard and UDF people before and after the press

conference, and that at least one of the conversations pertained to the upcoming press conference. However, Cooke has failed to establish any evidence of a conspiracy or that James was involved in developing the written materials or deciding what Gillan would say at the press conference such that James could be held liable for the defamatory comments attributed to Gillan. In order to reach such a conclusion, I would first have to infer that James' discussions with Gillan and the others extended beyond his legal representation of Colleen Cheadle and UDF, that he discussed or planned or knew what Gillan intended to say at the press conference, and that there was an agreement on some level to knowingly make false statements or make statements with a reckless disregard of whether the statements were false at the press conference. Cooke has failed to meet his burden of showing the existence of a genuine issue of material fact with regard to this claim.

Accordingly, I would affirm the judgment of the trial court.

APPENDIX E

Court of Common Pleas
of Franklin County, Ohio

No. 99 CVC 06 4512

[Filed June 7, 2002]

Reginald A. Cooke Plaintiff-Appellant,	)
v.	)
United Dairy Farmers, Inc., Defendants-Appellees.	)

ENTRY

GRANTING DEFENDANT JAMES' AND DEFENDANT CRABBE, BROWN'S MOTION FOR SUMMARY JUDGMENT FILED APRIL 24, 2001

JUDGE JENNIFER L. BRUNNER

Rendered this 7th day of June, 2002.

On April 24, 2001, Defendants Larry H. James ("James") and Crabbe, Brown & James ("Crabbe, Brown") (collectively, "Defendants") filed their motions for summary judgment. Defendants' motion on May 16, 2001. Defendants filed their reply in support of their motion for summary judgment on June 4, 2001. The parties' motions are, therefore, considered submitted to the Court for decision pursuant to Loc. R. 21.01 and Loc. R. 57.01.

Procedural Considerations on Motion for Summary Judgment

Summary judgment is a procedural device designed to terminate litigation where a resolution of factual disputes is unnecessary. *Ferron u. Ray, et al.*, 2000 Ohio App. LEXIS 6011 (December 21, 2000), Franklin App. No. 00AP-699, *unreported*.

Civ. R. 56 (c) provides, in pertinent part:

> . . . Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence and stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is

> adverse to the party against whom the motion for summary judgment is made . . .

The Ohio Supreme Court has succinctly summarized the requirements of Civ. R. 56 (c), as follows:

> (1) there is no genuine issue as to any material fact; (2) the movant is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made, the nonmovant being entitled to have the evidence construed most strongly in his favor.

Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 66. In reaching a conclusion on whether or not any genuine issues of fact do exist, the Court must exercise caution not only to resolve doubts, but also to construe the evidence before it, in a light most favorable to the non-moving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 3t7; *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1; *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356; *Norwest Bank Minnesota, N.A. v. Biscello*, 2000 Ohio App. LEXIS 5242 (November 14, 2000), *unreported*. The Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Turner v. Turner* (1993), 67 Ohio St. 3d 337, 340.

Facts of the Case

Plaintiff is a trial attorney who filed several lawsuits alleging racial discrimination against defendant United

Dairy Farmers, Inc. ("UDF") on behalf of various plaintiffs, in matters of litigation that included *Williams v. United Dairy Farmers, Inc.*, Case No. C2-96-1060, United States District Court, Southern District of Ohio, Eastern Division, and *Johnson v. United Dairy Farmers, Inc.*, Case No. C2-97-1071, United States District Court, Southern District of Ohio, Eastern Division. Over the course of his representation in these discrimination cases, Plaintiff held several news conferences, issued press releases, and commented on the lawsuits on radio talk shows and in newspapers. There was extensive media coverage.

On June 4, 1998, Defendants UDF and Brian Gillan ("Gillan"), Chief Operating Officer and General Counsel of UDF, held a press conference. Gillan conducted the press conference. During the press conference, a videotape of Patty Munyan, a key witness for plaintiffs in the discrimination lawsuits, was played. On the videotape Munyan ostensibly admitted that UDF did not discriminate and that she had been lying about the alleged discrimination. UDF had purchased the videotape from Warren Freeman, Munyan's boyfriend, who represented that he had recorded Munyan without her knowledge. At the press conference UDF made written materials available to members of the press.

Edward Howard & Co. ("E.H. & Co.") was hired as UDF's public relations firm in 1996 as a result of the publicity surrounding the discrimination cases. E.H. & Co. worked with UDF in planning the June 4, 1998 press conference and handled UDF's public relations in matters concerning the discrimination cases. James attended the Dress conference. No other employee of Crabbe,

Brown was present. James did speak at the press conference. Whether or not he helped plan what was said at the press conference, or helped write the written materials distributed at that event is a disputed fact. Also, in dispute is whether James even knew he would be speaking at the press conference or if he only spoke after being asked to do so by Gillan after arriving at the press conference.

While addressing those attending the press conference, James stated that he "had a professional responsibility to report Cooke's alleged wrongful conduct to the Office of the Disciplinary Counsel for the Supreme Court of Ohio..." (Complaint ¶31; Answer ¶ 31.) This is the only allegedly defamatory statement attributed by Plaintiff directly to James.

Gillan made several remarks at the press conference and in the written materials distributed to the media representatives that Plaintiff alleges to be defamatory. Plaintiff claims that James and Crabbe, Brown conspired with Defendants UDF and Gillan to commit libel and slander against him.

Application of Law

A. James' Allegedly Defamatory Statement

Plaintiff attributes only one allegedly defamatory statement directly to James. In response to a question at the press conference, James stated that he had a professional duty to report Plaintiff to the Office of Disciplinary Counsel. Defendants argue that this was a statement of opinion and is therefore protected by an absolute privilege under the Ohio Constitution.

The Ohio Constitution provides an absolute privilege for expressions of opinion, which would otherwise be defamatory. *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 111. Plaintiff has argued that this protection extends only to media defendants. The Ohio Supreme Court did, in fact, refer specifically to freedom of the press in its holdings regarding this protection in both *Scott u. News-Herald*, 25 Ohio St. 3d 243 (1986) and *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279. However, in August of 2001, the Supreme Court explicitly stated that Section 11, Article I of the Ohio Constitution "guarantees to 'every citizen' the right to publish freely his or her sentiments on all subjects, regardless of that citizen's association or nonassociation with the press." *Wampler* at 120. The Court went on to note that "[c]onstitutionally significant debate on matters of public concern is not the sole province of the media." *Id.* at 124. So although Defendants are not members of the media, they too are able to claim the opinion privilege. Because this privilege is absolute, if James' statement is one of opinion, neither he nor Crabbe, Brown may be held liable for it.

"The distinction between opinion and fact is a matter of law." *Id.* at 126. The Ohio Supreme Court has adopted a totality of the circumstances test to determine whether a statement is opinion or fact. Under this test, a court must consider four factors: (1) the specific language at issue; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared. *Id.* at 117-118 (citing *Vail*, supra).

The Court finds that the statement in question was an expression of James' opinion.[1] Plaintiff's conduct could not be a violation unless it were found to be such by the appropriate persons within the Ohio Supreme Court's jurisdiction. The Ohio Code of Professional Responsibility provides that:

> The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules.

Code of Professional Responsibility EC 1-4. While, James' statement may not have contained any words clearly, by the very terms implying that the statement was one of opinion, of the Code of Professional Responsibility, an attorney must use his or her judgment in determining whether or not he or she believes another attorney has violated the Code of Professional Responsibility and should be reported to the Disciplinary Counsel. If an attorney believes that another attorney has violated the Disciplinary Rules, he or she has an ethical duty to report that conduct. Code of Professional Responsibility DR 1-103. The statement is not verifiable unless and until a violation has been found by the appropriate authorities.

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[1] The Court does not condone the making of such a statement in a public forum, as D.R. 1-103 requires an attorney to report what he or she believes to be a violation, and once reported, the matter is confidential while being investigated by the Disciplinary Counsel. Gov. Bar R. V § 1 1 (E).

The statement complained of was made in the context of James acting as an advocate on behalf of UDF. One would not expect James to be a completely unbiased commentator on the situation as the Code of Professional Responsibility requires an attorney to represent his or her client zealously. Code of Professional Responsibility EC 7-1. For these reasons James' comment is protected as opinion by the Ohio Constitution.

It is noteworthy that Plaintiff presented no evidence in his memorandum contra James' and Crabbe, Brown's motion for summary judgment to rebut Defendants' arguments on this point This Court finds that James' statement was a statement of opinion and therefore is absolutely privileged under the Ohio Constitution.

B. The Civil Conspiracy Claim

A "civil conspiracy" is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 126 citing *Minarik v. Nagy* (1963), 8 Ohio App.2d 194, 196. While Plaintiff need not show an explicit agreement to defame him, he does have to demonstrate a common understanding or design, to commit an unlawful act." *Godsen v. Louis* (1996), 116 Ohio App.3d 195, 219.

There is no genuine issue of material fact regarding the civil conspiracy claim against James and Crabbe, Brown. Defendants have presented considerable direct evidence that James did not conspire with UDF and Brian Gillan to defame Plaintiff: Plaintiff has presented no evidence from

which reasonable inferences could be drawn to support the necessary elements for a finder of fact to conclude there was a conspiracy.

James testified that he intended to attend the press conference essentially as an observer, but also to answer questions regarding the Munyan tape and its likely effects on the discrimination cases. He further testified that he was unaware that Brian Gillan was going to introduce him and ask him to speak during the press conference. James stated in his affidavit in support of Defendants' motion for summary judgment that he played no part in planning the press conference; did not participate in the development of the written materials handed out at that event, had no knowledge of the content of the written materials or of Gillan's remarks until the day of the event, and did not know in advance that he would speak or participate in the event. James does not deny that he was involved in the public relations issues surrounding the discrimination cases or that he was in contact with E.H. & Co. He stated in his deposition that he was in contact with E.H. & Co. to provide them with a copy of the complaint from one of the discrimination cases, to provide them with a copy of the Munyan tape, and to coordinate with E.H. & Co. in an effort to follow Plaintiff around to various news conferences because [he] was on the press circuit about this case." (*James Depo.* p. 98.) E.H. & Co. would alert James when Plaintiff was going to be giving an interview and would set up an interview for James with the same news outlet.

Plaintiff argues that the fact that James remained at the press conference after hearing Gillan's allegedly defamatory statements permits the inference that James had a tacit

agreement with Gillan and UDF to defame Plaintiff. James testified in his deposition that he attended "as a lawyer to answer any questions relative to my role as counsel for UDF." (*James Depo.* p. 103-104.) The depositions of Wayne Hill, an Executive Vice-President at E.H. & Co., and Brian Gillan contain no evidence that James was involved in the planning of the press conference in such a manner so as to support a claim of conspiracy to defame.

Gillan's deposition testimony echoes James' as to James' role at the press conference. Gillan stated that questions were expected about the impact of the Munyan tape on the discrimination cases and that UDF and/or E.H. & Co. wanted James in attendance to field those questions and to address "the ethical considerations." (*Gillan Depo.* p. 139.) This is the only relevant mention of James in Gillan's deposition. Likewise, despite extensive questioning of Wayne Hill about the planning of the press conference, the only significant mention of James in his deposition was in reference to obtaining the Munyan tape from him. (*Hill Depo.* p. 60.) The evidence is insufficient for reasonable minds to conclude that James, UDF and Gillan had a common understanding to commit an unlawful act.

Plaintiff next points to a motion for sanctions filed in *Williams v. UDF*. That motion was signed by James and contained similar language to that used by Gillan at the press conference. Plaintiff argues that the similar language and the fact that the motion was filed on the morning of the press conference is evidence that James was involved in the planning of the press conference. This requires an inference that cannot reasonably be drawn from any direct evidence offered by Plaintiff. This much can be concluded: James was UDF's attorney and was clearly very involved in the

filing of pleadings in the *Williams v. UDF* and *Johnson v. UDF* cases. This press conference was timed to bring attention to UDF's views and defenses as expressed in the motion filed that morning on its behalf in the two federal cases.

James testified in his deposition that he was in contact with E.H. & Co. to provide them with the videotape, to provide them with copies of documents filed in the discrimination cases, etc. The fact that James provided information to persons planning the press conference does not alone evidence a conspiracy. The press conference centered on the discrimination cases, and James was the attorney handling those cases. It would be unreasonable to infer that the act of supplying court documents that are publicly filed, and even the evidence upon which the documents are based, demonstrates a common design that would rise to the level of a conspiracy. UDF to attend the press conference to address "ethical considerations" is insufficient to deny James' and Crabbe, Brown's motion. "Ethical considerations" could be inferred by a trier of fact to be any number of things, is that the term means a violation of attorney disciplinary rules, such term is so nonspecific that it fails to rise to the level of "material" as is contemplated in Civ. R. 56. *Buckeye Union Ins. Co. v. Consolidated Stores Corp.* (1990), 68 Ohio App.3d 19, 22.[2]

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[2] The Court stated that, "In every lawsuit there are some disputed issues of fact, but Civ.R. 56 focuses on those which are 'material.'" Citing *Anderson u. Liberty Lobby, Inc.* (1986), 477 U.S. 242, the Court explained that "[t]he mere existence of some factual disputes, if not material, will not defeat a summary judgment otherwise proper. If one's case is supported only by a 'scintilla' of evidence, or if his evidence is 'merely colorable' or

Plaintiff points to an early draft of the press conference remarks in which Gillan introduces James. The remarks were later changed, and the written version no longer mentioned James. Plaintiff argues that it is impossible to imagine a scenario in which this change was made that is consistent with James' testimony that he played no part in planning the press conference. Such a conclusion involves more speculation than fact. E.H. & Co. or UDF or Gillan could have just as easily decided ahead of time not to have James speak and deleted his name from the program. Even if James were the source of that decision, that alone does not rise to the level of conspiring to defame, or even that he helped plan the content of the statements made at the press conference.

Finally, Plaintiff points to certain billing records from E.H. & Co. as evidence of James' involvement in a conspiracy to defame. The billing entries of E.H. & Co. Plaintiff points to are the following:

> 5/13/98
> Prepare for news conference: material changes from Brian Gillan; review banquet plan form and confirmation from Hyatt; draft dirs./room info for Brian and Larry James; discuss and make edits to media advisory and news release with Wayne; pick-up transcript tape copies and pick-up duplication of tapes at MediaGroup

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not 'significantly probative,' summary judgment should be entered."

5/14/98

Tape to L. James in a.m.; changes to news release after WRH reviews; meet to review logistics, event planning for news release; calls to reschedule room.

5/18/98
Prep for news conference; meet w/ B. Gillan, L. James, J. Sallee, A. Lirtzman to discuss next steps

6/3/98
Complete work on press conference plans and materials;
discussions w/J. Kompa, B. Gillan, L. James

The May 13th entry merely indicates that directions and room information were to be provided to James. The May 14th entry indicates simply "tape to L. James in a.m." It appears from this entry that James provided E.H. & Co. with a tape that was returned to James.

The May 18th entry indicates that E.H. & Co. employees were to meet with several people including James "to discuss next steps." James testified in his deposition that he could say, "unequivocally there was no meeting on or about that date between those parties..." (*James Depo.* p. 97.) Even if it did take place, the entry appears on its face to be two separate entries under the same date. A meeting about "next steps" is vague and not significantly probative. Although James appeared to be somewhat involved in the public relations efforts surrounding the discrimination cases, any conclusion that a meeting between E.H. & Co. and James was about the

press conference and not the litigation is speculative at best. The same holds true for the June 3rd entry.

Plaintiff references in his memorandum contra a draft of Gillan's press conference remarks that was faxed to Davis Young, the Chairman of the Board of E.H. & Co. on April 27, 1998. Surely if any such documents had been found bearing James' fax number or remarks, Plaintiff would have so noted. The absence of any such evidence says much about James' likely involvement. As noted in their reply brief, "despite a tremendous amount of paper that was generated by E. Howard & Co., Gillan and others at UDF in preparation for the press conference, including many drafts, faxes and other correspondence, James does not show up on those documents as having drafted, sent or received any of it."

The evidence offered by Plaintiff demonstrates that UDF, James, Crabbe, Brown, and E.H. & Co. were coordinating their efforts to gain public support for UDF's position regarding the discrimination lawsuits and in the concomitant media coverage. These coordinated efforts, however, fail to rise to the legal level of conspiracy. The only way to reach such a conclusion is to draw rather tenuous and unreasonable inferences. This is insufficient to survive summary judgment, particularly on an issue for which Plaintiff bears the burden of proof. See *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111 (holding that granting summary judgment in favor of defendant was appropriate because plaintiff did not produce direct evidence of his claim, but merely inferences).

The Court's role is to determine whether there is sufficient evidence for reasonable minds to reach a single

conclusion that is adverse to Plaintiff as to these defendants' motion. The Court believes that defendants have offered that evidence. Where the moving party has met its burden, if the nonmoving party fails to produce evidence demonstrating a genuine issue of *material* fact, the motion for summary judgment must be sustained. *Buckeye Union Ins. Co.*, at 22. Once the moving party has met its burden of proof, the nonmoving party must produce more than a mere scintilla of evidence to survive summary judgment. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Badio Corp.* (1986), 475 U.S. 574. Defendants' have offered substantial direct evidence in support of their motion for summary judgment, meeting the necessary burden to support a motion for summary judgment. Plaintiff has not presented evidence sufficient to demonstrate a genuine issue of material fact, and the Court finds that reasonable minds could reach but one conclusion, and that conclusion is adverse to Plaintiff.

Accordingly and for the foregoing reasons, the Court GRANTS Defendants Larry James' and Crabbe, Brown's motion for summary judgment filed April 24, 2001. Pursuant to Loc. R. 25.01, counsel for the Plaintiffs and counsel for the Defendant shall jointly prepare and circulate an appropriate judgment entry that reflects this decision. The judgment entry shall be titled as follows:

JUDGMENT ENTRY
GRANTING DEFENDANT
LARRY JAMES' AND
CRABBE, BROWN & JAMES'
MOTION FOR SUMMARY JUDGMENT
FILED APRIL 24, 2001

and shall contain the necessary language that, "There is no just cause for delay in the entry of this order."

IT IS SO DECIDED.

/s/ _____
Jennifer L. Brunner, Judge

COPIES TO:

John A. Yaklevich
Moore, Yaklevich & Mauger
326 South High Street, Suite 300
Columbus, Ohio 43215
Counsel for Plaintiff

Jerry S. Sallee
Dinsmore & Shohl LLP
1900 Chemed Center
225 East Fifth Street
Cincinnati, Ohio 45202
Counsel for Defendants
United Dairy Farmers, Inc.
and Brian Gillan

Louise S. Brock
Dinsmore & Shohl LLP
1900 Chemed Center
225 East Fifth Street
Cincinnati, Ohio 45202
Counsel for Defendants
United Dairy Farmers, Inc.
and Brian Gillan

Gall C. Ford
Vorys, Sater, Seymour and Pease
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216
Counsel for Defendants
Larry H. James and
Crabbe, Brown, Jones,
Ports & Schmidt

Court of Common Pleas
of Franklin County, Ohio

No. 99 CVC 06 4512

[Filed June 18, 2002]

Reginald A. Cooke	)
Plaintiff,	)
	)
v.	)
	)
United Dairy Farmers, Inc.,	)
Defandants.	)
	)

FINAL JUDGMENT ENTRY
GRANTING DEFENDANTS
LARRY JAMES AND
CRABBE, BROWN & JAMES'
MOTION FOR SUMMARY JUDGMENT
FILED APRIL 24, 2001

Upon good cause shown and for the reasons set forth in the Court's decision of June 7, 2002, the Court hereby enters Final Judgment granting Defendants Larry James and Crabbe, Brown & James'. Motion for Summary Judgment, filed with this Court on April 24, 2001. All of Plaintiff's claims against Defendants Larry James and Crabbe, Brown & James are therefore dismissed with prejudice.

Pursuant to Cir. R. 54(B), the Court further expressly determines that there is no just reason for delay in the entry of this Order.

IT IS SO ORDERED.

/s/ _____
Judge Brunner

APPROVED:

/s/ _____
John A Yaklevich
MOORE, YAKLEVICH, AND MAUGER
326 South High St.
Suite 300
Columbus, OH 43215-4525

Attorney for Plaintiff
Reginald A. Cooke

/s/ _____
Gail C. Ford (0034653)
Joseph R. Miller (0068463)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Sleet
P. O. Box 1008
Columbus, Ohio 43216-1008,
(614) 464-640O

Attorneys for Defendants
Larry H. James and Crabbe, Brown & James

/s/ _____

Jerry S. Sallee (0013303)
Louise S. Brock (0067184)
DINSMORE & SHOHL LLP
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Attorney for Defendants
United Dairy Farmer, Inc. and Brian Gillan

APPENDIX F

UNITED DAIRY FARMERS
PRESS RELEASE PACKET

June 4,1998

Good morning. My name is Brian Gillan and I am chief operating officer for United Dairy Farmers. By way of background, I previously was a partner with the law firm of Dinsmore & Shohl and served as outside legal counsel to United Dairy Farmers on the matters involved with the various discrimination claims made against the company.

I am here today to share with you direct, disturbing and damaging evidence that conclusively proves several points:

- First, the attacks against United Dairy Farmers over the last 1 and 1/2 years are false.

- Second, the claims were part of an unethical and illegal scheme to get money from the company.

- Third, the key supporting witness for the plaintiffs is -- by her own words, which you will see and hear -- a liar.

- Fourth, it appears that the attorney who cynically helped orchestrate this campaign for his own financial gain, fanned the flames with his racial rhetoric to force the company to settle these bogus claims.

Quite simply, the entire story that has been fabricated is not -- and never has been -- about black and white; it is -- and always was -- about green, the color of money.

We need to go back in time to get the perspective that is needed to understand the importance of today's evidence and the reasons why it topples the house of cards that has been constructed.

Approximately three years ago, two former employees of the United Dairy Farmers store at Frebis and Fairwood were fired for "violating company cash-handling procedures." These two individuals -- Maudie Williams and her son Michael Williams -- had previously received warnings concerning their conduct on the job. They admitted -- in writing -- that they had not followed explicit procedures developed to ensure that the cash at the store is safeguarded. Both Ms. Williams and her son are African-American, but they made no claim at the time that their termination was racially motivated.

After several months had passed, both Ms. Williams and her son -- who now were represented by attorney Reginald Cooke -- filed charges with the Ohio Civil Rights Commission. Two different investigators were assigned to the charges and the agency essentially reached split decisions on what amounted to the same evidence in each case.

The Williamses and their attorney next filed two lawsuits in federal court seeking approximately $17 million in damages. They claimed that their employment had been terminated because of their race rather than due to their admitted violations of company procedures.

In December, 1996, as part of their efforts to force the company to settle these claims, the Williamses and their attorney organized two days worth of virtually nonstop public demonstrations in Columbus and Cincinnati, featuring the appearance of national civil rights leader Reverend Jesse Jackson. The company was vilified for its alleged employment discrimination policies in general. However, very specific and very public demands were made for the company to settle the lawsuit for a monetary payment. It was made very clear that removing the sanctions against the company -- which shortly thereafter included an organized boycott and picketing --were contingent upon agreeing to this financial demand. As we will see shortly, getting that money was the critical motivating goal.

Additional pressure was brought to bear on the company when several other employees or former employees filed claims with various local, state and federal agencies claiming discrimination by the company. Six individuals filed discrimination charges with the Columbus Community Relations Commission. There was one common link in all of those filings -- attorney Reggie Cooke represented all of those individuals.

Each of these developments also featured massive publicity efforts by Mr. Cooke, complete with inflammatory rhetoric that invoked the worst racial images -- all in an effort to make the company reach a financial settlement of the $17 million lawsuits.

United Dairy Farmers has continued to stress that it believes that the alleged discrimination did not occur. The

company emphasized that it was willing to have the court hear the facts, examine the law and then make a determination. That's what the justice system is designed to achieve.

Today, we now have proof that the claims were false, that those involved knew they were false and that the entire campaign was arranged with the hopes of hitting a financial jackpot.

A few weeks ago, the company was approached by an individual who asked if we would be interested in a videotape of the key supporting witness -- Ms. Patty Munyan -admitting that she had been lying about the alleged discrimination.

Ms. Munyan was an assistant manager for the store where Mrs. Williams and her son both worked. Ms. Munyan, who is white, was publicly brought forward by Mr. Cooke and his supporters as evidence that white workers were supporting the Williamses' claims. Much was made of her purported enlightened racial views and actions. Of legal significance, her testimony provides the building blocks on which the $17 million federal lawsuits were constructed. Ms. Williams testified that she believed she was discriminated against by United Dairy Farmers because of what Ms. Munyan told her she had seen and heard. Mr. Williams said the source of his information about the alleged discrimination against him was his mother, who was told about these matters by Ms. Munyan. In short, Ms. Munyan is the key .... and she herself admits that she is lying.

The individual who contacted the company was Mr. Warren Freeman. There was no prior contact or connection

between Mr. Freeman and United Dairy Farmers. He and Ms. Munyan developed a relationship last year. He said that he had a tape of Ms. Munyan admitting her role in this scheme and that he would make it available to the company for $10,000. After carefully researching the legal issues involved, the company decided to pay the requested amount. Well-established legal precedent has determined that while paying a lay witness for his/her testimony is not permitted, it is allowable to purchase evidence. The company did not pay him to make these recordings. Rather, he came to us with the videotape unsolicited and we bought the tape.

Mr. Freeman secretly recorded the videotape you are about to see by placing a camera in a laundry basket in the apartment in which Ms. Munyan was living, one which she says had been secured for her by her attorney, Mr. Cooke. Ms. Munyan apparently disliked his apartment, as you will hear in graphic and offensive detail.

I will now play this tape for you, but I must alert you that it does contain racial epithets and coarse language. The language is absolutely vile and offensive. As a company that abhors the opinions expressed on the tape, we wrestled with the most appropriate manner in which to share it with you today. However, in an effort to preserve its integrity, we concluded that it was important to make the tape available to you in its entirety.

I want to emphasize that the tape you will see is exactly what was presented to us -- no edits, no changes of any sort. Please refer to the transcripts that have been provided as you watch. In some places, you will see typed-in words where the court reporter had labeled the portion inaudible.

Those typed-in words and phrases are what we were able to determine after repeated viewing and listening of the tape.

+ + + + + + + + +

Let's review some of the key points we have just heard and seen.

First, Ms. Munyan agreed to lie to support Ms. Williams' claim because she was promised a split of the money they planned to receive. Here's what she said:

> *"They were saying that a supervisor -- some supervisors at work where I work on Frebis were discriminating. They weren't really, you know.* (Maudie) *just caused a bunch of trouble. And she talked to me and asked to go on the Civil Rights Commission and said whatever she gets she'll split. I said okay. All I had to do is do what her and her lawyer said, and that's what I did."*

When Mr. Freeman asked her why she would lie, Ms. Munyan responded very simply and very directly:

> *"Money. Ain't you ever wanted money. ... I was getting ready to leave my husband and <expletive> like that and that's why I did it. "*

Ms. Munyan also revealed another reason why she would participate in this scheme:

> *"A bunch of <N-word> said that UDF discriminated. I was mad at UDF because I went up there to take my leave of absence and stuff and Bill*

(Bales, a supervisor who became a target of the lawsuits) *acted like I was a <expletive>* (crook) *or something. So I'm going to get even with that son-of-a-bitch, too. He was going to tell on me for having an affair on my husband with a security guard.*

Ms. Munyan rationalized why it was okay for her to lie:

"*Well, at the time that I did it I thought I was doing the right thing and I thought a little lie wouldn't hurt. I didn't know it was going to be all this. Because when I talked to Reggie (Cooke) and them about it they said, Oh, they'll settle quick.*"

As that segment reveals, the Williamses' attorney -- Mr. Cooke -- was a key part of this scheme. She also had this to say about him:

"*Well, <he> told me he was going to make me rich, but I ain't seen no money yet.*"

Ms. Munyan described why she was living in the apartment and her dissatisfaction with it:

"*That's the only reason I'm here, the Williams stuff He's* (Reggie Cooke) *afraid I'm going to go someplace else and he won't have me for the case. ... Then Reggie got me this apartment the other day and told me that -- to be ready to go to court. I'm pretty sure it's in July. They'll go to court the only thing that's going to happen is they're going to get their money and <expletive> Patty. That's how it's gonna be.*

"It's supposed to be a safeway house. That's what it's supposed to be. That's why they got them damn locks all over the doors and shit and you can't get in unless you got a key on the outside or (inaudible). *And the bad thing about it, I don't have no place to go and I'm up there in<N-word>-ville, man. They're on every <expletive> corner."*

It is clear from this tape that Ms. Munyan has willingly participated in a gigantic fraud against United Dairy Farmers, the judicial system, and the people of Columbus. This fraud was cast in phony racial discrimination language because she, the plaintiffs and their attorney all thought that would be an easy way to force money from the company. Had we settled the case, as we were repeatedly pressured and threatened to do, they would have gotten away with it. Today, their fraud has been unmasked.

As a result of these developments, we have taken the following steps:

- Motions have been filed in United States District Court supplementing our previous request to find in favor of United Dairy Farmers and dismiss the actions against the company.
- Those motions also request legal sanctions against the Williamses and their attorney, Reggie Cooke, for their gross abuse of the judicial system.
- We also have asked that the Court order the plaintiffs and their attorney to pay the attorneys' fees and other expenses that United Dairy Farmers has incurred as a direct result of the knowingly false claims that were made against the company.

- The videotape evidence of Ms. Munyan's admission that she lied has been delivered to the City Attorney's office to help show that any action against the former store manager, Colleen Cheadle, should be dismissed.
- Ms. Munyan's admitted perjury has been brought to the attention of appropriate legal authorities so they can determine if she should be prosecuted for her role in these matters.

As was stated at the outset, these developments are very troubling. It is now evident that this case has been about money from the beginning:

- It was about money when the Williamses filed inflated claims for damages in federal court, challenging their dismissals from UDF.
- It was about money when Ms. Williams asked Ms. Munyan to lie for her.
- It was about money when Ms. Munyan agreed to lie.
- It was about money when the attorney involved, Reggie Cooke, demanded settlement of the claims.
- It was about money when public pressure was added to those calls for monetary payment.

Yet this base motive was concealed while the scheme's masterminds publicly invoked the specter of racial discrimination as cover for their actions. By doing so, they perverted the principles of racial equality for their own profit.

United Dairy Farmers remains committed to maintaining an environment where individuals can seek jobs, employees can work and customers can shop free of any form of prejudice, discrimination or harassment. That

was the company's policy before these claims were made and it remains the company's policy today. We continue to work to improve our efforts in these matters, just as other workplaces and organizations are doing throughout the country. What we were not willing to do is pay to settle something that we believe -- and today's developments confirm -- did not occur.

As this case now reveals, a rush to judgment does not serve justice.

FACT SHEET

Timeline of United Dairy Farmers' Record of Cooperation

Background: During late 1996 and early 1997, six different complaints were filed with the Columbus Community Relations Commission by individuals who claim that they were discriminated against at one United Dairy Farmers (UDF) store because of their race during their employment or their alleged efforts to become employed with the company. UDF filed extensive responses with the Commission documenting that the company had not discriminated against these individuals, showing that the alleged incidents either did not occur or that the complaints ignore relevant facts which undercut their claims. The Commission ultimately dismissed four of the six complaints in mid-October and referred two of the claims to the City Attorney's office for further review. The City Attorney found only one charge worthy of pursuing, and even then only against the former UDF store manager, Colleen Cheadle. The City Attorney is not pursuing any claims against UDF.

The following key dates highlight the case -- from the initial allegations to the announcement detailing the fraudulent nature of the claims in May 1998.

- 3/6/95 and 1/22/95: Maudie Williams (3/95) and her son Michael Williams (1/95), two former employees of UDF store at Frebis and Fairwood, were fired for "violating company cash-handling procedures." Dismissal followed warnings concerning job conduct and a written admission that they failed to follow explicit procedures to ensure the cash at the store is safeguarded. At the time of their dismissal, neither Maudie or Michael made claims that their termination

was anything other than appropriate discipline for their improper actions.

- 3/14/95 and 3/23/95: Maudie Williams (3/14) and Michael Williams (3/23), now represented by attorney Reginald Cooke, filed charges with the Ohio Civil Rights Commission. Two different investigators were assigned to the charges and they reached split decisions on what amounted to the same evidence in each case.

- 11/25/96 and 7/29/96: Maudie Williams (11/96) and Michael Williams (7/96), represented by attorney Reginald Cooke, filed two lawsuits in federal court seeking $17 million in damages and claiming their employment had been terminated because of their race rather than due to their admitted violations of company procedures.

- 12/10/96: UDF officials met with Rev. Jesse Jackson at the request of the Interracial Leadership Council (ILC) to review the company's antidiscrimination policies. UDF stresses its record of fair and impartial labor and hiring practices.

- 12/23/96: UDF reinforces its Open Door Policy with employees through a series of internal announcements. The policy is designed to help employees resolve work-related concerns and problems by maintaining open lines of communication between employees and all levels of management. If an employee has a work-related concern or problem, he/she is encouraged to speak with an immediate supervisor; the concern escalates to higher levels of management until the concern is resolved. (A 1-800 phone line is also available for employees to use

if they are uncomfortable about approaching his/her manager directly.)

- 12/24/96: Correspondence is sent to Rev. Jesse Jackson and to Pastor Timothy Clarke of the ILC following the December 10th meeting with UDF President Robert D. Lindner, Jr. Three main issues are stressed:

  1) Lindner's personal attention in implementing UDF's continued efforts to guarantee, fair, equal and non-discriminatory treatment of its employees, prospective employees and customers;
  2) UDF's future initiatives to build on its already-strong record of minority employment through greater outreach to various referral sources for minority applicants, a reinforcement to employees of the company's anti-discrimination policies, diversity training within the company, efforts to increase minority representation in upper management and an examination of the opportunities for more relationships with minority vendors and suppliers;
  3) UDF's intention to not settle the lawsuits alleging racial discrimination because the claims are false. UDF stated the two individuals whose employment was terminated lost their jobs because of their repeated failures to follow important company cash handling guidelines, not because of their race.

- 1/14/97: Interracial Leadership Council (ILC) asks the public to boycott UDF stores.

- 1/15/97: UDF said that the call for a boycott of the company's retail stores was a "regrettable" development that is not justified by the facts of the company's

operations that were previously provided to the boycott organizers.

"Despite the fact that we have a significantly higher proportion of minority employees in our employment base than Ohio's demographic make-up and have pledged several steps to improve our existing anti-discrimination policies, a boycott of our stores has been called," UDF President Robert D. Lindner, Jr., said. "One of the principal reasons for this boycott is that the company is not willing to settle two racial discrimination lawsuits -- seeking $17 million in damages -- filed by two employees who were dismissed from their jobs because they repeatedly failed to follow company cash handling procedures."

- 1/17/97: UDF published "an open letter to the community" in various statewide newspapers to inform the public on its anti-discrimination policies.

- 6/17/97 & 6/18/97: Columbus Community Relations Commission (CCRC) held two days of testimony regarding the claims of racial discrimination against UDF filed with the CCRC over the previous several months by six individuals. The six were either former employees or applicants at the Frebis and Fairwood UDF store. Floyd Weatherspoon, law professor at Capital University, was appointed by the Commission to chair the hearing. Weatherspoon's responsibility was to recommend whether the 22-member Commission should ask the city attorney's office to file charges against UDF.

- 9/23/97: UDF issues statement in response to alleged cancellation of the store boycott organized by Cincinnati-area ministers. Despite the progress made since its January open letter to the community -- continuing to look for ways to increase minority employment, strengthening the company's existing anti-discrimination policies and expanding its advertising in minority media -- UDF later learns that the boycott had not been canceled.

- 9/30/97: Plaintiff's attorney Reginald Cooke announces a new federal lawsuit by the same six individuals involved in the CCRC hearings and Lois Johnson (another former UDF employee whose racial discrimination charge had been dismissed by the Equal Employment Opportunity Commission.)

- 10/2/97: UDF announces that the supposed "new lawsuits" simply are repackaged versions of previous complaints -- including one that actually had been dismissed by the Equal Employment Opportunity Commission.

  "There actually were only two lawsuits filed yesterday -- one of them had seven plaintiffs while the other suit had named one party," said Frank Cogliano, vice president - retail store operations, UDF. "The first lawsuit announced yesterday was filed on behalf of individuals who had lodged complaints (prepared by the same attorney) with both state and federal civil rights agencies. Those agencies and their staffs had been reviewing the claims thoroughly and were preparing their reports and recommendations. However, rather than allowing the original process that they had selected

to be completed, the plaintiffs now have jumped to a different forum, apparently in hopes of getting more favorable treatment."

"One of the claims (Ms. Lois Johnson) actually did make it through the original process, and the Equal Employment Opportunity Commission concluded that there was no probable cause to believe that discrimination had occurred. In other words, the EEOC found that UDF followed the law and did not discriminate against Ms. Johnson."

- 10/13/97: Columbus Community Relations Commission dismissed four of the six claims and referred two of the claims to the City Attorney's office for further review as part of "the process of getting a full and complete review of all the facts.

  "Since the standards of proof and evidence are much higher at this level, we are certain that the City Attorney will carefully examine the record and supporting documents to determine if prosecution is warranted," said Frank Cogliano, vice president - retail store operations, UDF.

  The company also stated "it remained confident that (UDF) has followed the law and does not discriminate against employees, job applicants or customers."

- 10/97 to 3/98: The City Attorney's office reviews the two claims referred by the Columbus Community Relations Commission. On March 5, 1998, the City Attorney files a charge on behalf of one former UDF employee, Ernestine Lett, and against only the former

UDF store manager, Colleen Cheadle. The company is not charged.

- April, 1998: UDF is approached by Warren Freeman. Freeman independently obtained a tape that reveals important facts about the alleged discrimination charges. Note: the videotape was transcribed by a professional reporter and notary public, obtained without any prior knowledge of -- or cooperation from UDF -- and its authenticity has been independently verified.

- April 1998: UDF reviews tape; Munyan states on the tape that she did not hear UDF employees use racial slurs and that UDF did not discriminate against Michael and Maudie Williams. Munyan admits on the tape that she agreed to testify falsely for Michael and Maudie Williams and Cooke. In exchange for her testimony, Munyan was to receive a percentage of the money that Williams' mother and Cooke anticipated receiving in an out-of-court settlement by UDF.

- May 15, 1998: UDF announces at a news conference that it has filed supplemental motions in United States District Court to dismiss the Michael Williams and Maudie Williams lawsuits.

FOR IMMEDIATE RELEASE

Contact:
Brian Gillan
United Dairy Farmers
(513) 396-8787
Wayne Hill/John Kompa
Edward Howard & Co.
(614) 224-4600

United Dairy Farmers Files Motion to Dismiss Discrimination Charges

COLUMBUS, Ohio -- June 4, 1998 -- United Dairy Farmers (UDF) officials announced today that the company has filed supplemental motions in United States District Court to dismiss the race discrimination lawsuits filed by two former employees who had been fired for violating company cash handling procedures. The motions were filed after the company received videotaped evidence showing that the key witness testifying against UDF lied, committed perjury, and was part of a coordinated scheme to force money from the company.

Brian P. Gillan, UDF, chief operating officer, said the videotape contained "direct, disturbing, and damaging evidence that reveals that the attacks against United Dairy Farmers over the last 1 1/2 years are false."

"The tape also reveals that the key supporting witness for the plaintiffs lied repeatedly to help the plaintiffs -- and herself -- get money from the company," Gillan said. "It also spotlights the involvement of the plaintiffs' attorney, who fanned the flames with racial rhetoric to force the

company to try to settle these bogus claims.

"Quite simply, the entire, phony story that has been fabricated is not -- and never has been -- about black and white; it is -- and always was -- about green, the color of money," Gillan said.

The lawsuits seeking $17 million from United Dairy Farmers were filed by two African-American former employees of the United Dairy Farmers store at Frebis and Fairwood who were fired approximately three years ago for "violating company cash-handling procedures."

These two individuals -- Maudie Williams and her son Michael Williams -- had previously received warnings concerning their conduct on the job. They admitted -- in writing -- that they had not followed explicit procedures developed to ensure that the cash at the store is safeguarded.

Today, Gillan stressed that the videotape was made without any prior knowledge of-- or request from -- UDF. In addition, he said the company thoroughly reviewed the authenticity of the tape.

The tape revealed the following:

- First, Patty Munyan, a key witness supporting the claims against UDF, agreed to lie because she was promised a split of the money they planned to receive:

  "*They were saying that a supervisor -- some supervisors at work where I work on Frebis were discriminating. They weren't really, you know.*

(Maudie Williams, a plaintiff) *just caused a bunch of trouble. And she talked to me and asked to go on the Civil Rights Commission and said whatever she gets she'll split. I said okay. All I had to do is do what her and her lawyer said, and that's what I did."*

- When asked why she would lie, Munyan responded:

  "Money. Ain't you ever wanted money. ... I was getting ready to leave my husband and <expletive> like that and that's why I did it."

- Munyan rationalized why it was okay for her to lie:

  "Well, at the time that I did it I thought I was doing the right thing and I thought a little lie wouldn't hurt. I didn't know it was going to be all this. Because when I talked to Reggie (Cooke, the Williamses' attorney) *and them about it they said, Oh, they'll settle quick."*

Based upon the videotape evidence provided to the company, UDF has taken the following legal actions:

- Motions were filed in United States District Court supplementing UDF's previous request to dismiss the actions against the company.
- Those motions also request legal sanctions against the Williamses and their attorney, Reggie Cooke, for their gross abuse of the judicial system.
- UDF has asked that the Court order the plaintiffs and their attorney to pay the attorneys' fees and other expenses that the company has incurred as a direct result of the knowingly false claims, that were made against

UDF.

- The videotape evidence of Munyan's admission that she lied has been delivered to the City Attorney's office to help show that any action against the former store manager should be dismissed.
- Munyan's admitted perjury has been brought to the attention of appropriate legal authorities so they can determine if she should be prosecuted for her role in these matters.
- The videotape evidence will be given to the Ohio Supreme Court's disciplinary counsel to determine appropriate action against Mr. Cooke.
- UDF and Bill Bales have filed suit in Hamilton County against Patty Munyan and Reggie Cooke for their involvement in this scheme.

"UDF remains committed to maintaining an environment where individuals can seek jobs, employees can work and customers can shop free of any form of prejudice, discrimination or harassment," Gillan said. "That was the company's policy before these claims were made and it remains the company's policy today.

"We continue to work to improve our efforts in these matters, just as other workplaces and organizations are doing throughout the country. What we were not willing to do is to pay to settle something that we believe -- and today's developments confirm -- did not occur."

Founded in 1942 and based in Cincinnati, Ohio, United Dairy Farmers operates more than 200 convenience stores in three states.

Videotape Transcript
United Dairy Farmers Sets the Record Straight

The following quotes are from a videotaped conversation between Patricia Munyan, a former United Dairy Farmers (UDF) assistant store manager, and Warren Freeman. The videotape was transcribed by a professional reporter and notary public, obtained without any prior knowledge of-- or cooperation from -- UDF and its authenticity has been independently verified. The full transcript follows these excerpts.

Munyan states on the tape that she did not hear UDF employees use racial slurs and that UDF did not discriminate against Michael and Maudie Williams. Munyan admits on the tape that she agreed to testify falsely for Michael and Maudie Williams and Cooke. In exchange for her testimony, Munyan was to receive a percentage of the money that Williams' mother and Cooke anticipated receiving in an out-of-court settlement by UDF.

Munyan on her reasons for lying:

- "Money, Ain't you ever wanted money?"
- "Yeah, I can lie about when I want to <expletive> lie, it's a free country ain't it."
- "I worked for them for eight years and then I get <expletive> on. I didn't get nothing out of it, that's for damn sure. When she asked me to go up there to Civil Rights, she told me she'd pay me if she got anything out of it and I did it."

Munyan on interaction with her attorney:

- "Well, told me he was going to make me rich, but I ain't seen no money yet."

- "Well, at the time that I did it I thought I was doing the right thing and I thought a little lie wouldn't hurt. I didn't know it was going to be all this. Because when I talked to Reggie and them about it they said, Oh, they'll settle quick."

Munyan, on her view of the case:

- "They was saying that a supervisor -- some supervisors at work where I work on Frebis were discriminating. And they weren't really, you know. (Maudie) just cause a bunch of trouble. And she talked to me and asked me to go on the Civil Rights Commission and said whatever she gets she'll split. I said okay. All I had to do is do what her and her lawyer said; and that's what I did."
- "It's a discrimination charge. A bunch of <n-word> said that UDF discriminated. I was mad at UDF because I went up there to take my leave of absence and stuff and Bill acted like I was a <expletive> (crook) or something. So I'm going to get even with that <expletive> too. He was going to tell on me for having an affair on my husband. (With a security guard.)

Munyan on planned testimony and results:

- "Then Reggie got me (this apartment) the other day and told me that -- to be ready to go to court. (They'll) go to court the only thing that's going to happen is they're going to get their money and <expletive> Patty. That's how it's going to be."
- "So really I guess I got to go, but just get up there and lie like I've been lying."

Note: all phrases in parenthesis represent language where a court reporter labeled the portions of the videotape

inaudible. The typed-in words and phrases are what UDF's legal counsel was able to determine after repeated viewing and listening of the tape.

Background Statements

Numerous statements and threats have been made by attorney Reginald Cooke and other supporters of the various plaintiffs, all designed to put pressure on United Dairy Farmers to settle the original lawsuits and the other claims that have been made. It is useful to remember both those statements and the company's response on those matters.

Pressure to Settle
Statement

"...there's just no need for this difficult situation to continue to tear apart Columbus. UDF should settle the matters." -- Interview with attorney Reginald Cooke, WTVN radio, March 18, 1998

"It (a settlement) would be cheaper for everybody, and quicker." Rev. H.L. Harvey, Jan. 18, 1997, *Cincinnati Enquirer*.

"Despite Jackson's presence, widespread publicity and community outrage, Cooke said UDF corporate officials have indicated that they have no plans to settle the suits out of court."
'I have learned that the persons in the corporation have decided not to settle this matter but litigate it in court. The Rev. Jesse Jackson made an honorable attempt to settle this matter and they chose not to. That's unfortunate.'" -- Attorney Reginald Cooke, *The Columbus Post*, Jan. 9-15, 1997

UDF Position

"Finally, while we acknowledge your interest in settling the lawsuits brought against the company alleging racial discrimination, we do not intend to settle them because the claims made against us are false. The two individuals whose employment was terminated lost their jobs because of their repeated failures to follow important company guidelines, not because of their race."

"The rhetoric of race is being used to advance a claim that does not have any merit and it would be wrong for us and a disservice to all of our employees to settle such an action. As is their right, the plaintiffs chose to pursue their action in court. As is our right, we believe that the court is the best place to examine *all* of the facts, not just the claims selected by the plaintiffs to gain the most advantageous news coverage. We are confident that when the legal process is completed, UDF's record of not discriminating against any employee will be upheld." -- Robert D. Lindner, Jr., President, UDF, letter to Rev. Jesse Jackson, 12/24/96.

"We have said all along the way that this is not a race issue. It's a matter of right and wrong. And we'll stand behind that." -- Frank Cogliano, vice president operations, UDF, Feb. 2, 1997, *Cincinnati Enquirer*.

Highly-Charged Rhetoric
Statement

"We want someone in jail for discrimination, for abusing the rights of African Americans. We don't want any kind of deal cut because the discrimination has been so blatant and strong."-- Attorney Reginald Cooke, *Columbus Post*, June 26, 1997

"UDF has "systemic" racial problems and said it needs some enforceable monitoring mechanisms to "detoxify the atmosphere." -- Rev. Jesse Jackson, Dec. 11, 1996, *Cincinnati Enquirer*.

UDF Position

"Throughout its 55 years of operation as a private, family-owned company, United Dairy Farmers has worked hard to reflect the values of honesty, integrity, fairness in its relationships with employees, customers and the communities we serve." -- Robert D. Lindner, Jr., President, UDF, Dec. 11, 1996, Associated Press.

Boycott-Related Statements
Statement

"It is rare to find a corporation of this size today that would be unwilling to resolve this matter and would allow the situation to develop into a boycott." -- Rev. Timothy Clarke, president, Interracial Leadership Council, *Columbus Dispatch* Jan. 15, 1997

"(The boycott) is in response to the numerous and repeated instances of blatant racial slurs, egregious insults, derogatory name-calling and illegal acts carried out by UDF management against African-American employees and customers." -- Rev. C. Dexter Wise, president of the Columbus Rainbow/Push chapter, Jan. 16, 1997, *Cincinnati Enquirer*.

"The primary reason (for the boycott) is because the corporation is simply not willing to discuss settlement of the lawsuits. We have determined that while they have made

some great offers and explained their corporate structure and opportunities for equal employment, we cannot dismiss the evidence, witnesses and testimony that these lawsuits support. Since they're not willing to take into account the pain and suffering (Black employees and customers) have been subjected to, we have no other choice than to go ahead with the boycott." -- Rev. Timothy Clarke, president, Interracial Leadership Council, *Columbus Post* Jan. 16, 1997

Boycott of UDF stores was called "because UDF has refused to settle the Williamses' case out of court." - Interracial Leadership Council, *The Columbus Dispatch*, Jan. 19, 1997.

"While holding hands, we will sing and pray that the discrimination by management at United Dairy Farmers will be brought to an end." -- Rev. Timothy J. Clarke, president of the Interracial Leadership Council, Jan. 15, 1998, *Call & Post*, discussing Martin Luther King Day demonstration.

UDF Position

"Because we have chosen not to settle out of court, a boycott of our stores has been announced. That tactic does not change our belief that the legal process the former employees initiated should be followed. We are confident that our record of nondiscrimination will be upheld." -- Robert D. Lindner, Jr., President, UDF, Jan. 24, 1997, *Business First (Columbus)*.

"The decision to call for a boycott is regrettable, but it does not change our belief that the legal process the former employees initiated should be followed." -- Robert D.

Lindner, Jr., President, UDF, Jan. 16, 1997, *Cincinnati Enquirer*.

"Despite the fact that we have a significantly higher proportion of minority employees in our employment base than Ohio's demographic makeup -- and have pledged several steps to improve our anti-discrimination policies -- a boycott of our stores has been called." -- Robert D. Lindner, Jr., President, UDF, Jan. 16, 1997, *Columbus Dispatch*.

"We are confident that our record of nondiscrimination will be upheld." Bob Linder, UDF president, *The Columbus Dispatch*, Jan. 19, 1997.

"We felt that prayer was the appropriate way to honor Dr. King and we will also be praying in remembrance of him," Frank Cogliano, vice president, UDF, Jan. 15, 1998, *Columbus Post*.

Encouraging Further Legal Action
Statement

"We want the full force of the city behind this grievance. It is a city problem, and we believe we can solve it in Columbus." -- Attorney Reginald Cooke, *The Columbus Dispatch*, Jan. 3, 1997, after Ernestine Lett, Erika Conner and Tammy Montgomery alleged racial discrimination.

"There's no way if this goes to fruition it's not going to hurt the company."-- Attorney Reginald Cooke, *Columbus Dispatch*, Oct. 14, 1997

"I don't agree with letting the corporation off the hook, and

I think that is probably a tragic error. But don't be mistaken, UDF will be on trial because they have basically retained a lawyer for (Cheadle). ... they are certainly still involved in this matter." -- Attorney Reginald Cooke, *The Columbus Dispatch*, Feb. 28, 1998, on the news that four of the six cases referred to the Community Relations Commission were dismissed.

UDF Position

"The information available to United Dairy Farmers does not support the claims and allegations made by these individuals. Even though these alleged incidents reportedly occurred some months ago and we were not made aware of them until after today's news conference was held, we will look into each of these situations thoroughly." -- Frank Cogliano, UDF vice president of operations, company statement, January 3, 1997, following announcement of new charges by Ernestine Lett and Tammy Montgomery.

"This orchestrated set of activities appears to be yet another tactic to try to pressure the company to settle the original multi-million dollar lawsuit filed against the company after it dismissed two employees who were found to have violated company cash handling procedures at the story where they had worked." -- Robert D. Lindner, Jr., President, UDF, company statement, October 2, 1997.

Munyan's truth-telling
Statement

"I can't back down because of this. I'm scared but I still have to tell the truth." -- Patricia Munyan, *Columbus Post*, Jan. 22-28, 1998, after her apartment was vandalized by an

unknown person(s).

UDF Position

"Our contention is that United Dairy Farmers is an outstanding company that does not condone discrimination now, nor ever will." -- Frank Cogliano, UDF, Jan. 20, 1998, *Columbus Dispatch*

TRANSCRIPTION OF VIDEOTAPED CONVERSATION BETWEEN PATRICIA MUNYAN AND WARREN FREEMAN

taken stenographically by me, Carla D. Smith, a Prcfessional Reporter and Notary Public in and for the State of Ohio, from video tape and audio cassette provided to me by Shaw Video Communications on Monday, April 6, 1998.

[p.2]

MR. FREEMAN: Patty?

MS. MUNYAN: What?

MR. FREEMAN: Where in the hell did you place my sticks?

MS. MUNYAN: Your what?
What's wrong with the T.V.?

MR. FREEMAN: I think it's broke.

(Inaudible) MR. FREEMAN: Louie's got an ear infection.

MS. MUNYAN: Do you want something to eat now or do you want it later?

MR. FREEMAN: I'll eat later.

MS. MUNYAN: I'll make them steaks or something.

MR. FREEMAN: And we have boob tube. Now what was you saying about (inaudible) tomorrow at 10:00. She went to orientation today. Damn, I'm freezing.

MR. FREEMAN: You're always freezing.

MS. MUNYAN: Why should I freeze? Why are -- Aren't you cold?

MR. FREEMAN: (inaudible).

MS. MUNYAN: I've got to go downtown [p.3] tomorrow, too for that public (inaudible) Defender. I have to go because (inaudible). It's for that OMVI charge.

MR. FREEMAN: What about your divorce?

MS. MUNYAN: (Inaudible).

MR. FREEMAN: (Inaudible).

MS. MUNYAN: (Inaudible).

MR. FREEMAN: (Inaudible). Look at that, bitch.

MS. MUNYAN: (Inaudible) and that's about it. (Inaudible) Yea, Reggie's supposed to represent me niggers, that's for damn sure. If I be (Inaudible) black she'd be in there right now in the courtroom.

MR. FREEMAN: Yeah.

MS MUNYAN: That' s the only reason we're here (Inaudible) the Williams stuff. He's afraid I'm going to go someplace else and he won't have me for the case.

MR. FREEMAN: Why do you keep doing it to yourself?

MS. MUNYAN: Well, told me he was going to make me rich, but I ain't seen no money yet. I said I get my shit destroyed and stuff over it.

MR. FREEMAN: I wouldn't do it no more if I was you.

MS. MUNYAN: I ain't doing it no more. I'm not going to court, either. I'm going to tell them the truth.

[p.4]

MR. FREEMAN: What the hell happened anyway?

MS. MUNYAN: They was saying that supervisor -- some supervisors at work where I work on Frebis were discriminating. And they weren't really, you know. (Inaudible) Maudie just cause a bunch of trouble. And she talked to me and asked me to go on the Civil Rights Commission and said whatever she gets she'll split. I said okay. All I had to do is do what her and her lawyer said, and that's what I did.

MR. FREEMAN: How did you get yourself into this? (inaudible)?

Ms. Munyan: I have a manger just like her.

MS. MUNYAN: I don't know. It's just like he might as well have been a nigger. He belongs over there on a boat back to Africa. I don't know.

MR. FREEMAN: When do you go back to court?

MS. MUNYAN: I think it's in June or July. I don't know. Then Reggie got me (inaudible) this apartment the other day and told me that -- to be ready to go to court. I'm pretty sure it's in July. They'll (Inaudible) go to court the only thing that's going to happen is they're going to get their money and fuck Patty. (Inaudible). That's how it's gonna be.

MR. FREEMAN: (Inaudible).

[p.5]

MS. MUNYAN: (Inaudible).

MR. FREEMAN: (Inaudible).

MS. MUNYAN: (Inaudible).

MR. FREEMAN: I just don't know that much about it. That's the thing. I just never even heard that much about it.

MS. MUNYAN: Well, it's been all over the news.

MR. FREEMAN: Well, you know how I watch T.V. See how I'm sitting hare talking to you and the T.V. is over there.

MS. MUNYAN: It's a discrimination charge. A bunch of niggers said that UDF discriminated. I was mad at UDF because I went up there to take my leave of absence and stuff and Bill acted like I was a fuckin' (inaudible) crook or something. So I'm going to get even with that son-of-a-bitch, too. He was going to tell on me for having an affair on my husband. (Inaudible). With a security guard.

MR. FREEMAN: (Inaudible).

MS. MUNYAN: Yeah, I can lie about when I want to fucking lie, it's a free country ain't it. (inaudible).

MR. FREEMAN: (Inaudible).

MS. MUNYAN: (Inaudible). You sure you ain't got no toenail clippers?

MR. FREEMAN: What are you gonna do when [p.6] you go back to court?

MS. MUNYAN: I ain't going back. Fuck them. Because they don't have to if they (inaudible) subpoena me. So really I guess I got to go, but just get up there and lie like I've been lying.

MR. FREEMAN: (Inaudible).

MS. MUNYAN: (Inaudible). Marriage wrecked it. That's what did it. Marriage will do it. That's why (inaudible). I'm never getting married. I suppose you ain't never been (inaudible) in prison.

MR. FREEMAN: Well, I've done a few things in

my life; but I'll tell you what, I ain't never lied like that.

MS. MUNYAN: Well, at the time that I did it I thought I was doing the right thing and I thought a little lie wouldn't hurt. I didn't know it was going to be all this. Because when I talked to Reggie and them about it they said, Oh, they'll settle quick. (Inaudible) .

MR. FREEMAN: (Inaudible). They started the game, might as well finish it.

MS. MUNYAN: Yeah. (Inaudible). Can't leave now.

MR. FREEMAN: (Inaudible).

MS. MUNYAN: What really makes me so damn mad is I'm the only one that ends up losing (inaudible) from the shit. Trying to kill me and shit.

[p.7]

MR. FREEMAN: Why in the hell would you lie for them like that?

MS. MUNYAN: Money. Ain't you ever wanted money?

MR. FREEMAN: Yeah. I'll tell you, there's been a time or two that I'd like to have had me a few grand, but I don't know.

MS. MUNYAN: Well, that's what -- I was getting ready to leave my husband and shit like that and that's why

I did it.

MR. FREEMAN: (Inaudible).

MS. MUNYAN: I worked for them for eight years and then I get shit on. I didn't get nothing out of it, that's for damn more. When she asked me to go up there to Civil Rights, she told me she'd pay me if she got anything out of it and I did it.

MR. FREEMAN: I'll tell you one thing, the lawyer (inaudible) is a crook (inaudible) and that's the truth.

MS. MUNYAN: Well, he don't like you.

MR. FREEMAN: I ain't much fucking happy about him either. (inaudible).

MS. MUNYAN: It's like they put me up there and just fucking with me.

MR. FREEMAN: Has this protective custody thing has got four locks on the door?

[p.8]

MS. MUNYAN: It's supposed to be a safeway house. That's what it's ~~supposed to~~ be. That's why they got them damn locks all over the doors and shit and you can't get in unless you got a key on the outside or (inaudible). And the bad thing about it, I don't have no place to go and I'm up there in niggerville, man. They're on every goddamn corner.

MR. FREEMAN: (Inaudible).

MS. MUNYAN: (Inaudible) Jenny will be coming home sporting her big old nigger boyfriend.

MR. FREEMAN: Yeah. (Inaudible). What a big booty you got snow girl.

MS. MUNYAN: (Inaudible). Snow bird.

MR. FREEMAN: Yeah. (Inaudible).

MR. FREEMAN: (Inaudible).

MS. MUNYAN: (Inaudible). My nigger tape you threw out the window. It was fucked up.

MR. FREEMAN: (Inaudible). It had to go.

MS. MUNYAN: Well, one thing I can say is (inaudible). I like nigger music.

MR. FREEMAN: (Inaudible). You like nigger music?

MS. MUNYAN: What's the song you sing? (Inaudible). Sipping on gin and juice.

MR. FREEMAN: (Inaudible).

MS. MUNYAN: What's that song you sing?

[p.9]

(Inaudible).

MR. FREEMAN: I forget. (Inaudible).

MS. MUNYAN: (Inaudible). I can't remember what it was you was singing now, and I know it, too. (Inaudible) J.R. used to sing it when he was little.

MR. FREEMAN: (Inaudible) And to think I ate the pussy (inaudible) where that big black dick (inaudible) has been. Kiss the lips that suck your balls time and time again. It's enough to make the man throw up. It sure is hard to figure.

Did you write this song?

MS. MUNYAN: (Inaudible) Is that my song?

MR. FREEMAN: That's your song.

MS. MUNYAN: You dedicate that to me?

MR. FREEMAN: I dedicate it to you.

MS. MUNYAN: I wouldn't fuck a nigger if it was the last thing on earth. I'd wet its lips and stick it to the wall.

MR. FREEMAN: You're simple.

MS. MUNYAN: I'm simple?

MR. FREEMAN: You're simple.

MS. MUNYAN: No. I'm cold. (inaudible).

MR. FREEMAN: This is a pretty old place.

(Inaudible).

MS. MUNYAN: That's bull shit, though, man. He said (inaudible).

MR. FREEMAN: (Inaudible). Check the closet. That's where he had all his shit at. It would still be there. It's still there. He ain't been here.

MS. MUNYAN: Huh?.

MR. FREEMAN: He ain't been here.

MS. MUNYAN: Go out there and make our supper.

MR. FREEMAN: You go make the supper. You're the cook.

- - -

(End of video tape.)

- - -

CERTIFICATE

- - -

THE STATE OF OHIO,

SS:

COUNTY OF FRANKLIN,

I, Carla D. Smith, a Notary Public in and for the state of Ohio, do hereby certify that the foregoing is a transcription of the conversation contained on the video tape and audio tape provided to me.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on April 6, 1998.

/s/_____

Carla D. Smith
Notary Public
State of Ohio

My commission expires:
May 19, 2001.

- - -

AFFIDAVIT OF WARREN FREEMAN

STATE OF OHO :
: SS
FRANKLIN COUNTY :

I, William Freeman, being duly cautioned and sworn, state the following of my own personal knowledge.

1. I have known Patricia Munyan for approximately one year, in which capacity I have knowledge of, and am competent to testify with respect to, the matters herein. During the course of my relationship with Ms. Munyan, I videotaped her making statements concerning the discrimination litigation in Columbus against United Dairy Farmers, Inc. Ms. Munyan was unaware she was being taped. Her statements were given freely, voluntarily and without coercion of any kind.

2. During my relationship with Ms. Munyan, I was a guest in her apartments on many occasions. During conversations at those times, Ms. Munyan revealed to me that her testimony in the Columbus discrimination cases against UDF, including those of Maudi and Michael Williams, was false.

3. On or about March 25, 1998, without Ms. Munyan's knowledge and on my own initiative, I hid a video camcorder in a laundry basket in the apartment Mr. Reginald Cooke was providing for her. I then engaged Ms. Munyan in conversation, which was recorded by the camcorder.

4. On the video tape, Munyan described how Maudi

Williams asked her to testify against UDF before the Ohio Civil Rights Commission. She stated that Ms. Williams and Mr. Reginald Cooke promised her money in exchange for her false testimony against UDF. She further stated that she was motivated to create adverse testimony by a desire to "get even" with UDF for what she felt was mistreatment she experienced while employed by UDF.

5. Ms. Munyan also referred to the fact that Mr. Cooke was paying for her current apartment due to concern that she would not otherwise be available to testify in court.

6. During the videotaped conversation Ms. Munyan also made racially derogatory comments, including use of the word "niggers."

7. I initiated contact with representatives of United Dairy Farmers to advise them of the existence of the videotape. I provided it to them on April 6, 1998.

8. If asked to testify by United Dairy Farmers in any of the discrimination lawsuits in Columbus, I will do so.

9. My testimony will be truthful and complete.

FURTHER AFFIANT SAYETH NAUGHT.

/s/_____

Sworn to before me and in my presence, this 6th day of April 1998.

/s/_____
Notary Public

No. 05-739

In The
Supreme Court of the United States

REGINALD A. COOKE,

Petitioner,

v.

UNITED DAIRY FARMERS, INC., *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Franklin County

BRIEF IN OPPOSITION

JERRY S. SALLEE (0013303)
LOUISE S. BROCK (0067184)*
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Respondents United Dairy Farmers, Inc. and Brian P. Gillan

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether an attorney who on his own volition injects himself into the public eye by publicizing a lawsuit (or lawsuits) in which he has been retained becomes a "public figure" such that actual malice must exist in order for the attorney to sustain a defamation claim; *i.e.*, with respect to any statements limited to the matters which were the subject of that which the attorney publicized?

CORPORATE DISCLOSURE STATEMENT

Defendant United Dairy Farmers, Inc. has no parent corporation, nor do any publicly-held companies own ten percent or more of the stock of United Dairy Farmers, Inc.

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STATEMENT OF THE CASE

I. Introduction

Petitioner Reginald A. Cooke ("Cooke") is an attorney whose legal practice includes representation of individuals in employment-discrimination cases. Respondent United Dairy Farmers, Inc. ("UDF") was sued in 1996 by several former employees who were represented by Cooke. Respondent Brian P. Gillan ("Gillan") was employed by UDF as its Chief Operating Officer/General Counsel.

Cooke's defamation claim is based on oral and written statements Gillan made at a press conference on June 4, 1998. That press conference was held in response to numerous press releases, press conferences, news stories, and radio interviews in which Cooke previously was involved, related to discrimination cases he had filed against UDF. More specifically, the press conference was held when UDF obtained a videotape of one of Cooke's witnesses (Patricia Munyan) in the lawsuit he initiated against UDF, in which Munyan states that she had lied in her previous testimony accusing UDF of discrimination. The videotape was played in its entirety at the June 4, 1998 press conference, and copies of the tape and transcripts were distributed.

II. Cooke's Representation Of, And Initiation Of Litigation On Behalf Of, Individual Plaintiffs Claiming They Had Been Discriminated Against By UDF

In 1996 Cooke represented two former UDF employees, Maude and Michael Williams, in an action he initiated

in federal court on their behalf, claiming that UDF had discriminated against them. (Pet. at 3a)[1] The Williamses original employment discrimination complaint was filed on their behalf with the Ohio Civil Rights Commission ("OCRC") by another attorney, Dan Klos. (*Id.*)

During the OCRC's investigation of Maude Williams' discrimination claim, the Williamses presented the testimony of Patricia Munyan, a former UDF employee, that UDF discriminated against them. (*Id.* at 3a) The OCRC issued a "probable cause" determination in February 1996 with respect to Maude Williams' discrimination charge. (*Id.* at 3)[2]

After the OCRC's finding, Cooke " . . . was involved in planning several press conferences involving the Williamses, which he attended." (*Id.* at 5) As a result, in the ensuing months, Cook was contacted by other UDF employees, former employees, employment applicants, and customers who sought to pursue race discrimination claims against UDF. (*Id.*) In October 1997 the Columbus (Ohio) Community Relations Commission issued a finding that probable cause existed to believe that the City of Columbus' race discrimination law had been violated by both UDF and one of its store managers, Colleen Cheadle. (*Id.*) During that same month, Cooke filed a second federal court action against UDF and its district managers on behalf of seven of those additional employees, former employees, applicants, and customers. (*Id.*)

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[1] References to "Pet." herein are to Cooke's petition for writ of certiorari on file with this Court, and the page numbers therein.

[2] The OCRC issued a no probable cause finding with respect to Michael Williams' charge of discrimination.

III. Cooke's Media Blitz With Respect To The Litigation He Initiated Against UDF

Most importantly for the purposes Cooke seeks to bring to this Court's attention, is the state appellate court's finding in its March 31, 2005 Decision dismissing Cooke's defamation claim that:

> Cooke's deposition describes at length the efforts he made to publicize the allegations of racial discrimination lodged against UDF. He held multiple press conferences, fielded telephone calls from the media asking him to comment on the case, appeared on radio programs and at community organization meetings, and obtained the assistance of Reverend Jesse Jackson, a nationally-known figure whose support immediately attracted the attention of the national news media. As a result of these publicity efforts, Cooke attained a general notoriety in the community.

(*Id.* at 19a-20a) That conclusion was based upon Cooke's own deposition testimony about the numerous public statements he made, *viz.*:

- He informed two newspapers about the filing of the *Williams* lawsuits.
- He held a press conference to announce filing the *Williams* lawsuits.
- He held a press conference to announce claims against UDF filed with the City of Columbus (*i.e.*, before the Columbus Community Relations Commission) by three more individuals.
- He held a press conference to announce claims against UDF by two additional individuals.

- He either held a press conference or circulated a press release when additional federal lawsuits were filed.
- He held a press conference or made numerous telephone calls to the press after the city civil rights commission hearing to address the race-discrimination allegations.
- He held a press conference after the city attorney for Columbus, Ohio (charged with enforcement of the city's civil rights laws) decided not to pursue criminal charges under the city ordinance.
- He received frequent telephone calls from the media asking him to comment on or respond to various issues related to discrimination claims against UDF, which he did.
- Radio stations called him several times and he appeared "five to six" times on radio programs.
- He was invited to speak, and did speak, at community organization meetings where the press was present.

As a result, and as Cooke also testified at his deposition, he "was being inundated with calls from all around, not just in Columbus, Ohio, but throughout Ohio and received calls from people in surrounding communities, received calls from people in Cincinnati."

Particularly illuminating here is the trial court's previous recognition of Cooke's motivation in "going public":

> A review of the record indicates that there was great public attention and interest in the racial

discrimination actions filed by Maude and Michael Williams against UDF. Plaintiff himself has attested to the same in his deposition testimony, indicating that with respect to the suit filed by Maude and Michael Williams:

> . . . the decision was to at least make the lawsuit public, that we're filing a lawsuit and we'll proceed with that. And that the public is at least aware of that, in particular African-American communities, where at least an allegation is out there that there are derogatory comments being made about black customers as they are going in the store . . . so there was a sense of responsibility along those lines . . . not simply just to prosecute the case, but to possibly at least alert others. . . . And in this situation with UDF . . . was information, information that the public needed to know. . . . So it was really a sense of responsibility to at least let the public know.

(*Id.* at 43a-44a, quoting from Cooke's deposition testimony)[3]

[3] In his Statement of the Case (*id.* at 12) Cooke correctly states that the trial court issued its decision on April 30, 2004. In his Table of Contents (*id.* at iii) and in his Appendix where he reproduced the trial court's decision (*id.* at 28a), he erroneously indicates that the decision was issued on April 23, 2005.

IV. UDF's Purchase Of The Videotape Of Munyan In Which She Admitted She Previously Had Lied When She Accused UDF Of Discrimination

After two years of negative publicity, in the Spring of 1998, before the Williamses' case proceeded to trial, UDF was approached by Warren Freeman, the boyfriend of former UDF assistant manager Patricia Munyan, whom Cooke planned to call at trial. (*Id.* at 3a) Freeman had a videotape of Munyan admitting that she had fabricated her previous statements made to the OCRC on the Williamses' behalf, alleging that UDF and its supervisors had discriminated against the Williamses. (*Id.*) UDF paid Munyan's boyfriend $10,000 for that tape. (*Id.*)

V. The Press Conference Where Gillan Played The Munyan Videotape In Its Entirety And Made The Statements Upon Which Cooke Bases His Defamation Claim; And Cooke's Own Press Conference In Response

Respondent Gillan, UDF's Chief Operating Officer, played that tape, in its entirety, at a press conference in June 1998. (*Id.*) The primary basis of Cooke's defamation claim is Gillan's statements offered in conjunction with playing that videotape; *i.e.*:

- "'[T]he attacks against UDF over the last 1 and ½ years are false' and that they 'were part of an unethical and illegal scheme to get money from the company'."

- "Cooke 'cynically helped orchestrate this campaign for his own financial gain, fannedthe flames with his racial rhetoric, to force the company to settle these bogus claims'."
- UDF was "the victim of a 'gigantic fraud'."

(*Id.* at 14a-15a)

Shortly after Respondents' press conference, Cooke held his own press conference in response, where he presented Munyan herself and he generally denied the substance of the comments she attributed to him on the videotape. (*Id.* at 47a)

VI. The Appellate Court's Dismissal Of Cooke's Defamation Claim From Which He Seeks Review By This Court

A. Gillan's Statements Held To Be Non-Actionable "Opinion" Because Gillan Was Reacting To The Negative Publicity Engendered By Cooke

The appellate court applied the four-part test set down by the Supreme Court of Ohio in *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St. 3d 279, 281-82, 649 N.E.2d 182, 185, for determining whether particular statements are constitutionally protected "opinion." (*Id.* at 12a-13a) It concluded, with one exception, that Gillan's statements were "rhetorical hyperbole that would suggest to the listener that this is . . . Gillan's interpretation of Cooke's conduct," rather than a statement of fact. (*Id.* at 14a) Moreover, the appellate court further found that to "counter the negative publicity engendered by the Williamses' claims of racial discrimination . . . Gillan clearly

considered himself to be 'fighting fire with fire' by attempting to try the case in the court of public opinion." (*Id.* at 15a)

B. Because Of Cooke's Publicizing His Allegations Of Race Discrimination Against UDF, He Was A Limited Purpose Public Figure, And The Allegedly False Statement(s) By Gillan Were Not Made With Actual Malice; Hence They Are Non-Actionable

Although the appellate court found that Gillan's statement that Cooke represented the Williamses during the course of the OCRC proceedings was false (*id.* at 16a-18a), it nonetheless concluded that because Cooke was a limited purpose public figure as a result of his ongoing efforts to publicize the allegations of race discrimination against UDF, a defamation claim against Gillan would not lie unless Gillan made that statement with "actual malice." (*Id.* at 19a-20a)

Based on Gillan's deposition testimony – *i.e.*, that although Cooke did not initially represent the Williamses in the OCRC proceedings, he did in fact subsequently appear on their behalf after the OCRC issued the complaint and continued its "litigation around the complaint" – the court found that Gillan was not "aware that this statement was false at the time he made it." (*Id.* at 20a-22a) Hence, the appellate court concluded that "Cooke failed to raise a genuine issue of material fact as to whether Gillan acted with actual malice in stating that

Cooke represented the Williamses at the time of the OCRC complaint." (*Id.* at 22a)[4]

SUMMARY OF ARGUMENT

Petitioner Cooke willingly and admittedly thrust himself into the public eye by highly publicizing the discrimination lawsuits he initiated on behalf of his clients against Respondent United Dairy Farmers. In his own words, " . . . the decision was to at least make the lawsuit public . . . and that the public is at least aware of that . . . not simply to prosecute the case, but to possibly alert others. . . . [I]t was really a sense of responsibility to at least let the public know." Simply because Cooke did not violate any law, or Rules of Professional Conduct, does not mean that he cannot become a limited purpose public figure – so that actual malice must exist with respect to any alleged defamatory statements attributable to the subject matter Cooke publicized.

Where, as here, the plaintiff claiming to be defamed "voluntarily and deliberately thrust himself to the forefront

[4] Although not necessarily germane here, Maude Williams' lawsuit was tried in federal court in the fall of 1998, and resulted in a defense verdict. (*Id.* at 11) At that trial, the court allowed the Munyan videotape to be played and admitted into evidence. (*Id.*) After the jury verdict in *Williams* (and well after the earlier-in-time June 4, 1998 press conference), Williams filed a motion for a new trial (again relying on evidence not available at the time of the first trial) based upon her allegation that the tape was fabricated, yet that trial also resulted in a verdict for the defendants. (*Id.*) As for the other proceeding initiated by Cooke on behalf of the other employees and former employees, applicants and customers of UDF, a verdict was rendered in favor of three of the five plaintiffs whose claims proceeded to trial. (*Id.*)

of the controversy," courts have consistently held him to be a public figure with respect to those issues which the plaintiff put into play. The courts below correctly applied the standard implemented by this Court in *Gertz v. Welch*, 418 U.S. 323 (1974), and its progeny. Hence, Cooke's petition should be denied.

REASONS FOR DENYING REVIEW

I. The Courts Below Properly Applied The Public Figure Standard That Has Consistently Been Articulated By This Court In *Gertz v. Robert Welch, Inc.*, And Followed Since By Courts Throughout The Country; *i.e.*, Whether The Defamation Plaintiff Voluntarily Thrust Himself To The Forefront Of The Controversy

In his Petition, Cooke accurately describes how this Court has progressed from requiring *public officials* to demonstrate the presence of "actual malice" to sustain a defamation claim, to mandating that *public figures* who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issue involved," must do the same. *See* Pet. at 13, *citing New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), quoting from *Gertz* at 345. Significantly, Cooke does not make the slightest attempt to refute that he did in fact "thrust himself to the forefront of the controversy" here, by virtue of the media blitz he initiated and sustained over the two year period preceding the June 1998 press conference. Instead, Cooke is asking this Court to consider an exception to that principle for attorneys who, as he did, seek to

try their cases in the media – so long as they do not violate any law or professional code – rather than in the courtroom.

The history since *Gertz* regarding the public figure doctrine belies such a notion. Neither this Court, nor any other, has held that as long as a private individual does not violate any law or code they cannot become a public figure. If Cooke's proposed postulate were true, then he could publish a weekly newsletter, distribute it locally (or even nationally), attacking UDF; he could pay for a weekly (or daily) television (and radio) slot and vent his criticism of UDF; and/or he could organize and lead a weekly rally in Cincinnati, Ohio, UDF's headquarters, or multiple cities throughout the state (or even nationally), protesting what he considered to be unfair or even unlawful conduct on the part of UDF.[5] All this, according to Cooke, could not confer public figure status on him if, in the process, he violated no law or professional code. That not only is contrary to *Gertz* and its progeny; it defies all logic.

Various activities on the part of plaintiffs have been considered by courts in determining whether or not they are public figures:

> Radio or television appearances have often been cited as a factor in finding the plaintiff to be a public figure. . . . Making speeches or public appearances on the subject of the defamation has been considered by the courts as a factor in the public figure determination, as has granting interviews to the press, particularly where the

[5] In actuality that is essentially what Cooke did here, albeit on a more local level.

> plaintiff initiated such contacts, and making various other efforts to publicize the plaintiff's position, such as holding press conferences, distributing brochures, issuing press releases, submitting defamatory material to a television station, writing letters to newspapers and other media, hiring a public relations firm, and arranging for media coverage.
>
> * * *
>
> Extensive press or media coverage of the plaintiff or the controversy prior to the allegedly defamatory publication is frequently mentioned by the courts as evidence of public figure status.

See Tracy A. Bateman, Annotation, *Who Is "Public Figure" For Purposes Of Defamation Action*, 19 A.L.R. 5th 1, 60-62 and 63 (1992). Further, as in this case, "[w]here the plaintiff used the media to respond to the defamation [as Cooke did with his own post-UDF/Gillan press conference] . . . courts have considered this to be important." *Id.*; *cf. Doe v. Kohn Nast & Graf, P.C.* (E.D. Pa. 1994), 866 F. Supp. 190 (in case strikingly similar to the instant one, court refused to recognize an attorney's defamation claim when he transformed litigation into a matter of public concern).[6]

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[6] In that case the court recognized:

> [T]he vogue appears to be that lawyers seem to be unable to resist corralling a press conference, inviting all the media, both paper and electronic, to trumpet the alleged virtues of their case before the jury has been impaneled. Too many lawyers are trying to try their cases in that arena rather than the proper forum for getting to the truth, within the bounds of due process and fair play. Nevertheless, if that's the way the litigious game is being played today, it strikes

(Continued on following page)

Nothing in any of the foregoing criteria even suggests that the conduct must be unlawful or violative of any code; rather, the touchstone, as noted by this Court in *Gertz*, is how "they [*i.e.*, the plaintiffs] have thrust themselves to the forefront of particular public controversies." 118 U.S. at 345. Individuals acting in such a voluntary manner consistently have been held to be public figures. *See, e.g., Woy v. Turner*, 573 F. Supp 35, 38 (N.D. Ga. 1983) (plaintiff-sports agent held to have "voluntarily thrust himself into the forefront" of the controversy because he "made himself readily available for interviews and media attention, and even actively initiated media attention on a regular basis," including holding a press conference); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314, 1334 (W.D. Pa. 1974) (plaintiff-taxicab company owner "thrust himself into the controversy" when he "intentionally sought the press and the media to publicize his criticism of Yellow Cab's rate increase"); *Finkelstein v. Albany Herald Pub. Co.*, 195 Ga. App. 95, 392 S.E.2d 559, 561 (1990) (" . . . three days before the publication of the original [allegedly defamatory] article the plaintiff [who, like Cooke here, was an attorney] made an appearance on a local television program for the purpose of . . . discussing 'the problems . . . with the district attorney's office [which were referenced in the allegedly defamatory article]'," and thereby "voluntarily and deliberately thrust himself into the forefront of the controversy"), *cert. den.* (Apr. 18, 1990); *Hayes v. Booth*

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me as fair game that the other side be given the opportunity to talk back from a pedestal of similar visibility, without being susceptible to a defamation judgment.

Id. at 195 n.1.

Newspapers, Inc., 97 Mich. App. 738, 295 N.W.2d 858, 865-66 (1980) (attorney alleging he was defamed held to be public figure " . . . by the manner in which he conducted himself in a public judicial proceeding, invited attention and comment, and did so as well as taking affirmative steps to attract attention when he consented to the television as well as newspaper interviews.").

II. Consistent With Prior Precedent, The Courts Below Also Correctly Determined That Petitioner Was A Public Figure For Only A Limited Range Of Issues, But Which Included Those That Were The Subject Of The Alleged Defamatory Statements About Which Petitioner Complains

Moreover, a private person deemed to be a public figure under these circumstances is not relegated to the burden of proving "actual malice" with respect to *any* allegedly defamatory comments about him. As this Court pointed out in *Gertz*, " . . . an individual who voluntarily injects himself into a particular public controversy . . . thereby becomes a public figure for a *limited* range of issues." 418 U.S. at 323 (emphasis added). Applying this concept, the appellate court below noted: "A limited purpose public figure is one who becomes a public figure for a *specific range* of issues by being drawn into or voluntarily injecting himself into a specific public controversy." *See* Pet. at 19a (emphasis added; citations omitted).

Respondents never have taken the position, nor have the courts below held, that Cooke was a public figure for *all* purposes. In fact, the trial court specifically recognized

that the allegedly defamatory comments about which Cooke complained were consistent with the foregoing limitation, in that they pertained solely to those issues Cooke himself put into controversy:

> The statements made by Defendants at the June 4, 1998 press conference were about those same allegations [*i.e.*, the allegations of racial discrimination Cooke made against UDF over the preceding two years]. The statements were limited in scope to the purpose of informing the public of this new evidence that had surfaced indicating that Patti Munyan had been asked to testify falsely about the evidence of racial discrimination at UDF.

See Pet. at 44a.

Consequently the courts below not only applied the appropriate standard in finding Cooke to be a public figure, they also correctly limited the application of that status to only those matters he raised in the first instance.

CONCLUSION

The courts below correctly followed long-standing precedent of this Court. The exception Petitioner urges this Court to consider carving out from that precedent is ill-conceived and not based on any authority previously articulated by this or any other court. Accordingly, Respondents herein respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

JERRY S. SALLEE (0013303)
LOUISE S. BROCK (0067184)*
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Respondents
United Dairy Farmers, Inc.
and Brian P. Gillan

**Counsel of Record*